

Massachusetts Board of Registration of Real Estate Brokers and Salespeople Continuing Education Curriculum, 2001

Introduction

Massachusetts Real Estate Brokers and Salespeople are required to complete 12 hours of continuing education. The education must be completed within the twenty-four month period preceding their scheduled renewal date in order to renew as Active and practice real estate. This curriculum has been approved to be implemented beginning January 1, 2001. The previous 1999 curriculum approval ceases on December 31, 2000. However, if licensees obtained either all or portions of the previous curriculum they may apply that to their renewal provided it falls within the twenty-four month window.

The curriculum is comprised of 29 modules. Each module is designed to be administered over a two-hour period. The licensee is required to complete six different modules in order to satisfy the twelve hour requirement.

These modules, and the curriculum overall, are designed for real estate brokers and salespeople as an overview. Instructors should tailor their presentation based on the level of the class. Naturally, the depth of coverage of each topic within a module will vary. For instance a module being taught to a class of experienced licensees would likely focus more heavily on certain topics and less so others. A group of inexperienced licensees would require a more general overview with equal time given to all the items within a module. Similarly, a group of licensees who practice as commercial agents would need the material to reflect their needs.

This curriculum is designed for real estate brokers and salespeople to enhance their knowledge base of topics beneficial to the protection of the consumer. Although portions are designed to improve understanding of rights and obligations under the law, it is not a substitute for legal counsel. Materials such as state required forms, provided as part of the curriculum should only be used for study purposes and should not be disseminated to the general public. Nothing in this curriculum supercedes any state or federal law or regulations.

Schools are responsible to ensure their instructors are imparting accurate and current information. This curriculum was developed based on current laws. However, laws change and those changes should be incorporated into classroom materials.

Schools are responsible for procuring any of the referenced or sited materials. Be advised that many of the reference materials are copyrighted and, if used, copyright protections must be honored. Where court decisions are sited contact a law library or the clerk of the court that issued the decision.

Massachusetts Board of Registration of Real Estate Brokers and Salespeople
Approved Twelve Hour Continuing Education Subject Curriculum
29 Modules - January 1, 2001

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RE01R01 SELLER AGENCY

- I. History of Agency
 - a. States response to Federal Trade Commission survey – license regulation requires disclosure of agency representation.
 - b. 1990 MA Board of Registration of Real Estate Brokers and Salespersons held first agency forum.
 - c. 1993 MA Board of Registration of Real Estate Brokers and Salespersons revised agency disclosure form to recognize buyer agency.
 - d. Current MA regulation requires real estate agent to disclose form of agency to prospective buyers and sellers of real estate at the first personal meeting to discuss a specific property. (See state mandatory agency disclosure form).
- II. Establishment of Agency
 - a. Express written or oral contract where agent and principal agree to terms.
 - b. Implied agency by actions and/or words
 - c. Note: Compensation does not create an agency relationship.
- III. General Definitions unless cited by statute
 - a. “Real estate broker” – Any person who for another person and another person and a fee, commission or other valuable consideration, or with the intention or with the expectation of upon the promise of receiving or collecting a fee, commission or other valuable consideration, does any of the following:- sell, exchange, purchases, rents or leases, or negotiates, or offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of any real estate, or lists or offers, attempts or agrees to list any real estate, or buys or offers to buy, sells or offers to sell or otherwise deals in options on real estate, or advertises or holds himself out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate, or assists or directs in the procuring of prospects or the negotiation or completion of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, leasing or renting of any real estate. (See M.G.L., Chapter 112, Sec. 87PP).
 - b. “Real estate salesman”- An individual who performs any act or engages in any transaction included in the foregoing definition of a broker, except the completion of the negotiation of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, renting or leasing of any real estate. (See M.G.L. Chapter 112, Sec. 87PP).
 - c. “Agent” – One who represents interests of another (the principal ie. client or real estate broker).
 - d. “Principal” – Commonly known as person who engages agent for representation.

- e. “Client” – A person who empowers another to act as his or her representative/agent. Client relationship = fiduciary relationship.
- f. “Customer” – Generally refers to person without representation involved in transaction. All agents have a duty to treat customers fairly.

IV. Types of Agency

- a. Seller Agency – Real estate agent represents seller on client basis and treats buyer as customer.
- b. Subagency – Where seller client expressly or implicitly authorizes his broker to use other agents to market seller’s property.
- c. Buyer Agency – Real estate agent represents buyer client in real estate transaction.
- d. Single Agency – Real estate agent represents only one client (buyer or seller) in the transaction.
- e. Exclusive Agency – Real estate agent represents client for a specified time period.
- f. Exclusive Right to Represent – Agreement between client and broker granting broker exclusive right to represent client. Agent is entitled to compensation regardless of who completes transaction during the period of agreement.
- g. Dual Agency – a real estate broker who represents both the seller and buyer in the transaction is a disclosed dual agent with informed consent of both the buyer and the seller.
 - i. fiduciary duties owed to both buyer and seller
 - ii. Undisclosed dual agency is illegal.

V. Seller Agent’s Obligations to Client

- a. Obedience – agent must carry out all lawful instructions of client
- b. Loyalty – agent must act in best interest of client
- c. Disclosure – of all information which is relevant to client
- d. Confidentiality – duty to keep confidential client’s information or discussion. Duty survives termination of agency relationship. Duty does not apply to legally required disclosures such as known physical hazardous conditions of property.
- e. Accountability – agent must protect and account for all money, documents, or other personal property given to her by the client.
- f. Reasonable Care & Due Diligence – agent must act competently, capable of performing duties with scope of license requirements.

VI. Termination of Seller Agency Relationship

- a. Expiration of agreement
- b. Mutual agreement to terminate or rescission
- c. Completion of performance under agreement
- d. Death or Insanity of Agent or Client Principal

- e. Impossibility of performance (ie. destruction of property)
- f. Incapacity (ie. mentally incapable) or Bankruptcy of either party
- g. Repudiation – either principal or agent withdraws consent, court may deem this a breach of fiduciary obligation and breaching party may be held liable for damages.

VII. Compensation Methods

- a. Listing Contract if Listing Broker
 - i. Verbal vs. Written: clearly define term of contract, duties of agent and seller, and compensation
- b. Compensation Cooperating Agents – subagents & buyer agents
 - i. Listing Services
 - ii. Cooperating Agents Contacting Listing Broker prior to working towards a sale for compensation information. (ie. Newspaper Advertisement of Property)
 - iii. Compensation does not establish an agency
 - iv. Note: relationship Compensation is a matter of contract freely negotiated

“Set compensation among competitors is a violation of Anti-Trust Laws.:

VIII. Seller Agent’s Disclosure to Prospective Buyer’s

- a. State Mandated Agency Disclosure Form
- b. State and Federal Lead Paint Laws - require that any property where a child under six years old resides must be deleaded and property owner is responsible for compliance. Real estate licensees are required to notify all prospective purchasers and lessors about the dangers of lead paint and must inform prospective buyers about buyer’s 10 day right to a lead paint inspection. Federally approved state lead paint disclosure forms may be obtained from the Massachusetts Department of Public Health or local REALTOR® Boards. The three forms available are entitled the Property Transfer Lead Paint Notification Certification form, the Tenant Lead Law Notification form, and the Tenant Lead Law Certification form. For more information about the lead paint laws, consult Massachusetts General Law Chapter 111.
- c. Home Inspector Law - The law is in effect as of May 1, 2001. “At the time of the signing of the first written contract to purchase, real estate brokers and salesmen, or the seller if no broker or salesperson is involved in the sale, shall distribute a brochure, published by the Office of Consumer Affairs and Business Regulations, educating consumers about the home inspection process. Real estate brokers and salesmen shall not directly recommend a specific home inspection company or home inspector but may, upon request, provide a complete list of licensed home inspectors prepared by the board. This prohibition shall not apply if there is a written contractual agreement or a written agency disclosure between the buyer and the real estate broker specifying that the real estate broker is

acting exclusively for the buyer as a buyer's broker." (See attached M.G.L. Chapter 112, Section 87YY).

IX. Other Legal Obligations

a. Urea Formaldehyde Foam Insulation

105 CMR651.010 Obligation of Seller or Landlord to determine presence of UFFI

b. Psychologically Stigmatized Property – ie. felonies, murders, suicides

- i. Absent a specific inquiry by prospective purchaser or her agent to the seller or seller's agent, there is no duty for seller's agent to either investigate or affirmatively disclose murders, suicides, allegations of ghosts or other potential stigmas. (See Chapter 294 of the Acts of 1998).

ii. HIV Status

1. State law - questions regarding HIV status of any former or current occupant of residence should not be answered by a real estate licensee.

b. Massachusetts General Law - Chapter 93A – Consumer Protection Statute

- i. requires seller's agent to disclose known material defects on the property to potential buyers. ["actual knowledge" standard]
- ii. Chapter 93A does not apply to persons who are "not in the business of selling". Residential sellers, not in the business of selling homes, have no affirmative disclosure requirements with the exceptions that they must inform potential buyers about Urea Formaldehyde Foam Insulation (UFFI) and Lead Paint on the property.
- iii. Affirmative Disclosure Under Attorney General's Regulations
 - a) Anything that may influence a prospective purchaser
 - b) Physical defects in the property
 - c) Title defects and encumbrances

c. Sex Offender Registry

- i. According to statute, persons over age of 18 may request information from the sex offender registry for their own protection or the protection of a child or person under their care or custody. The statute imposes criminal penalties for misuse of information provided to the individual making the inquiry. Customers and clients should be urged to contact the

local police department to find out this information firsthand. (M.G.L. Chapter 6, Section 178D...).

- X. Disclosed Dual Agency – represent both buyer and seller
 - a. Disclosed – “informed consent” of buyer and seller
 - b. Undisclosed – failure to disclose and receive buyer and seller’s consent violates state licensing regulations and agency law. Buyer and seller may rescind the underlying real estate transaction and agent may be liable for all monetary damages.
 - c. Duties of Dual Agent
 - Modified duties = “OLD”
 - O**bedience
 - L**oyalty
 - D**isclosure
 - C**onfidentiality
 - A**ccountability
 - R**easonable Care & Diligence
- XI. Suggestions for Agents Regarding Client Counseling, Company Policy & Record Keeping
 - a. Communicate to seller his or her responsibilities as a client .
 - Ex. Buyer contacts seller directly.
 - b. Communicate company policies regarding cooperation and compensation and any potential to act as dual agent.
 - i. Advantages of written company policy versus verbal
 - a) Clearly defined duties of agent and client
 - c. Agency relationship created between broker owner of company and seller client. Agent of broker working with seller client creates the agency relationship between the broker of record and client. Owner broker is the only party authorized to determine form of agency representation for company.
 - d. Record Keeping
 - i. Agency Disclosure Forms – state regulation requires retaining forms for 3 years
 - a) Contracts – contract law statute of limitations is 6 years; recommend keeping records of contracts for 7.
 - b) All business records – state regulations do not specify time frame.
 - c) Escrow check copies – state regulation requires retaining copies for 3 years.
 - d. In event a dispute arises possible options include

a) Alternative Dispute Resolution & Mediation

REQUIRED HANDOUT –

- 1) Mandatory State Agency Disclosure Form
- 2) Mass. General Law – Chapter 294 of the Acts of 1998
- 3) Mass. General Law – Chapter 112, Section 87YY

Suggested References-

Agency Relationships in Real Estate, 2nd ed., by John Reilly

RE02R01 BUYER AGENCY

- I. History of Agency
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- d. Single Agency – Real estate agent represents only one client (buyer or seller) in the transaction.
- e. Exclusive Agency – Real estate agent represents client for a specified time period.
 - ie. Exclusive Buyer Agency: same as above and buyer client may work directly with seller to the exclusion of buyer agent.
- f. Exclusive Right to Represent – Agreement between client and broker granting broker exclusive right to represent client. Agent is entitled to compensation regardless of who completes transaction during the period of agreement.
- g. Dual Agency – a real estate broker who represents both the seller and buyer in the transaction is a disclosed dual agent with written informed consent of both the buyer and the seller.
 - i. fiduciary duties owed to both buyer and seller
 - ii. Undisclosed dual agency is illegal.

V. Buyer Agent’s Obligations to Client

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- f. Reasonable Care & Due Diligence – agent must act competently, capable of performing duties with scope of license requirements.

VI. Termination of Buyer Agency Relationship

- a. Expiration of agreement
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- e. Impossibility of performance (ie. destruction of property)
- f. Incapacity (ie. mentally incapable) or Bankruptcy of either party

- g. Repudiation – either principal or agent withdraws consent, court may deem this a breach of fiduciary obligation and breaching party may be held liable for damages.

VII. Buyer Agency Compensation

- a. Compensation Methods
 - i. Client pays fee – contingent fee, non-contingent fee, consulting fee, retainer credited against commission offered by listing broker
 - ii. Offer of compensation by listing broker through Multiple Listing Service or otherwise
 - iii. Compensation directly from transaction proceeds
- b. Compensation Calculation Models
 - i. Hourly
 - ii. Flat Fee
 - iii. % percentage fee of purchase price
- c. Compensation does not alone create agency representation
- d. Illegally switching type of agency representation – Undisclosed dual agency is illegal in Massachusetts and courts require forfeiture of the commission by those found guilty of this activity among other possible damages.

VIII. Other Legal Issues Affecting Buyer Representation

- a. State and Federal Lead Paint Laws
 - require that any property where a child under six years old resides must be deleaded and property owner is responsible for compliance. Real estate licensees are required to notify all prospective purchasers and lessors about the dangers of lead paint and must inform prospective buyers about buyer's 10 day right to a lead paint inspection. Federally approved state lead paint disclosure forms may be obtained from the Massachusetts Department of Public Health or local REALTOR® Boards. The three forms available are entitled the Property Transfer Lead Paint Notification Certification form, the Tenant Lead Law Notification form, and the Tenant Lead Law Certification form. For more information about the lead paint laws, consult Massachusetts General Law Chapter 111.
- b. Home Inspector Law - In effect as of May 1, 2001 - “At the time of the signing of the first written contract to purchase, real estate brokers and salesmen, or the seller if no broker or salesperson is involved in the sale, shall distribute a brochure, published by the Office of Consumer Affairs and Business Regulations, educating consumers about the home inspection process. Real estate brokers and salesmen shall not directly recommend a

specific home inspection company or home inspector but may, upon request, provide a complete list of licensed home inspectors prepared by the board. This prohibition shall not apply if there is a written contractual agreement or a written agency disclosure between the buyer and the real estate broker specifying that the real estate broker is acting exclusively for the buyer as a buyer's broker." (See attached (Chapter 146 of the Acts of 1999).

- c. Psychologically Stigmatized Property – ie. felonies, murders, suicides
 - i. Absent a specific inquiry by prospective purchaser or her agent to the seller or seller's agent, there is no duty for seller's agent to either investigate or affirmatively disclose murders, suicides, allegations of ghosts or other potential stigmas. (See Chapter 294 of the Acts of 1998)
 - ii. HIV Status
 - 1. State law - questions regarding HIV status of any former or current occupant of residence should not be answered by a real estate licensee.
- d. Mass. General Law - Chapter 93A – Consumer Protection Statute
 - i. requires seller's agent to disclose known material defects on the property to potential buyers. ["actual knowledge" standard]
 - ii. Chapter 93A does not apply to persons who are "not in the business of selling". Residential sellers, not in the business of selling homes, have no affirmative disclosure requirements with the exceptions that they must inform potential buyers about Urea Formaldehyde Foam Insulation (UFFI) and Lead Paint on the property.
 - iii. Due Diligence: Buyer's agent has a duty to ask questions on behalf of his or her client.
 - iv. Affirmative Disclosure Under Attorney General's Regulations
 - a) Anything that may influence a prospective purchaser
 - b) Physical defects in the property
 - c) Title defects and encumbrances
- e. Sex Offender Registry
 - i. According to statute, persons over age of 18 may request information from the sex offender registry for their own protection or the protection of a child or person under their care or custody. The statute imposes criminal penalties for misuse of information provided to the individual making the inquiry. Customers and clients should be urged to contact the local police department to

find out this information firsthand. (M.G.L. Chapter 6, Section 178D...).

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 - b. Undisclosed – failure to disclose and receive buyer and seller’s consent violates state licensing regulations and agency law. Buyer and seller may rescind the underlying real estate transaction and agent may be liable for all monetary damages.
 - c. Duties of Dual Agent
 - Modified duties = “OLD”
 - O bedience
 - L oyalty
 - D isclosure
 - C onfidentiality
 - A ccountability
 - R easonable Care & Diligence

- X. Client Counseling, Company Policy & Record Keeping
 - a. Explain to buyer his or her responsibilities as a client and determine search criteria for the property.
 - Ex. Contact buyer agent’s office to see a property.
 - b. Explain company policies regarding cooperation and compensation and any potential for buyer agent to act as dual agent.
 - i. Advantages of written company policy versus verbal
 - a) Clearly defined duties of agent and client
 - c. Agency relationship created between broker owner of company and buyer client. Agent of broker working with buyer client creates the agency relationship between the broker of record and client. Owner broker is only party authorized to determine form of agency representation for company.
 - a) Agency Disclosure Form is not Buyer Agent Contract
 - b) Record Keeping
 - i. Agency Disclosure Forms – state regulation requires retaining forms for 3 years
 - ii. Contracts – contract law statute of limitations is 6 years; recommend keeping records of contracts for 7.
 - iii. All business records – state regulations do not specify time frame.
 - iv. Escrow check copies – state regulation requires retaining copies for 3 years.

b) In event a dispute arises possible options include

i. Alternative Dispute Resolution &
Mediation

REQUIRED HANDOUT –

- 1) Mandatory State Agency Disclosure Form
- 2) Mass. General Law – Chapter 294 of the Acts of 1998
- 3) Mass. General Law – Chapter 112, Section 87YY

Suggested References:

Buyer Representation in Real Estate by Dianna Brouthers and Roger Turcotte
Agency Relationships in Real Estate, 2nd ed., by John Reilly

RE03R01 R.E.LAWS AND REGULATIONS FOR OWNERS AND MANAGERS

This course is designed for Real Estate Brokers who are the “responsible person” for a Real Estate Office, owner or manager, or Brokers who are considering opening their own office or moving into management. The instructor should presume that the Brokers taking the class are sophisticated and have more than a base knowledge of the licensing law.

I. Broker as Responsible Person

- A. Licensing, Reporting and Posting
- B. Advertising
- C. Escrow Duties
 - i. Holding Funds
 - ii. Interest v. Non-Interest Bearing Accounts
 - iii. Who the Interest Belongs to:
 - (a) Define In the Contract/Purchase and Sale Agreement
 - (b) If not defined: Interest Follows the Money
 - (c) Mass. Conveyancers Association Standards of Practice
- D. Maintaining Records
- E. Legal Responsibility and Liability
 - i. Consumer Protection Statute
 - ii. EEOC/MCAD
- F. Insurance v. Bond, Coverage/Purpose
- G. Legal Counsel

II Employees and Independent Contractors

- A. Employment and Independent Contractor Agreements
- B. IRS Letter Ruling on RE Salespeople
- C. Equal Employment Opportunity and Chapter 151B
- D. Terminations
- E. Noncompete Clauses
- F. Non-Licensed Assistants
- G. Licensed Assistant work for Broker of Record, No Dual Licensure
- H. Inactive Licensees/Referrals

III Listing Contracts

- A. Anti-Trust and Freedom of Contact
 - i. Commission Schedules
 - ii. Referral Fees
 - iii. Length of Agreements
- B. “Ready, willing and able” v. “If, as and when”
- C. Types of Listing/Brokerage Agreements
 - i. Exclusive Right to Sell
 - ii. Exclusive Agency Agreement
 - iii. Open Listing
 - iv. Net Listing (illegal)

- v. Exclusive Buyer's Representation Agreement
- D. Disclosed Dual Agency and Informed Consent

IV. Setting Policies and Procedures for Compliance with the Law

- A. Agency Disclosure
- B. Fair Housing
- C. Offer Presentment
- D. Lead Paint Disclosure
- E. Commissions and Referrals Fees
- F. Advertising

V. Types of Businesses, Licensure & Reporting Requirements

- A. Sole Practitioner
- B. DBA
- C. Corporations
- D. LLC and LLP
 - i. Insurance

VI. Office Policies/Technology

- e-mail
- advertising

Important Cases for Discussion:

- Tristram's Landing Inc. v. Waite, 367 Mass. 622 (1975)
- Underwood v. Risman 414 Mass. 96 (1993)
- Urman v. South Boston Savings Bank 424 Mass. 165 (1997)
- Kelly v. Marx 428 Mass. 877 (1999)
- McCarthy v. Tobin, 429 Mass. 84 (1999)

Other Sources

- The Real Estate Desk Book, A Broker's Guide to Consumer Protection, Procuring Cause and Commissions, Philip S. Lapatin, Greater Boston Real Estate Board, 1999
- The Standard Forms Guide, Philip S. Lapatin, Greater Boston Real Estate Board, 1991

RE04R01 Chapter 93A, Consumer Protection and Business Regulation for Real Estate Brokers and Salespersons

This course is designed for Real Estate Brokers and Salespersons and should explain the history, application, procedures and potential liability under the Consumer Protection Statute. Although this course is designed to improve understanding of the rights and obligations of Brokers and Salespersons, it is not a substitution for legal counsel and the Instructor, whether a lawyer or not, should avoid giving legal advice regarding specific, on-going cases.

I. M.G.L. c. 93A Regulation of Business Practices for Consumer Protection

A. Brief History

1. Caveat Emptor
2. Consumer Protection Movement
3. What it is and When enacted

II Application of Consumer Protection Statute

1. Brokers and Salespeople
2. Commercial Sellers, i.e. Bankers, builder/developers
3. Inapplicability to Sellers not engaged in trade or business, i.e. typical residential seller

III. Purpose and Procedure:

A. Consumer Protection:

1. Unfair and Deceptive Trade Practices
2. Fairness"
3. Deceptive
4. Affirmative Disclosure
5. Damages – A contract is not required
6. Who May Sue, standing

B. Encouraging Settlement

1. The Demand Letter
2. Opportunity to Offer Settlement
3. Multiple Damages (up to two or three time the damages)
4. Attorney's Fees

IV Disclosure/What Must Be Disclosed

A. The Residential Seller

1. Lead Paint

2. UFFI/Urea Formaldehyde Foam Insulation
- B. Brokers, Salespeople and business people subject to the Statute
 1. By Other Statutes
 - a) Lead Paint/Transfer Notification
 - b) UFFI
 - c) Home Inspector Licensing
 2. Affirmative Disclosure Under the Attorney General's Regulation
 - a) Anything that May Influence a Prospective Purchaser
 - b) Physical Defects in the Property
 - c) Title Defects or Encumbrances
 3. Role of Regulatory Agencies and Regulations in Consumer Protection

V Conditions and Defects

- A. Disclosure Requires Defects are Known to Broker or Salesperson
Underwood v. Risman 414 Mass. 96 (1993)
 1. Known through observation
 2. First hand knowledge, i.e. statement of seller
 3. Expert Opinion as fact, home inspector, engineer, etc.
- B. Physical Conditions/Defects in the Property Subject to Disclosure
 1. Physical Defects
 2. Environmental (other than Lead and UFFI)
 - a) Underground Storage Tanks
 - b) Chlordane
 - c) Lead Paint
 - d) Asbestos
 - e) Radon
 - f) other
 3. Zoning and Building Code Violations
 4. Off-site Physical Conditions
 - a) Not Readily Apparent v. Readily Apparent
 - b) Effecting the properties Use or Enjoyment
 5. Home Inspections
- C. Neighborhood Conditions/Non-Disclosure
 1. Fair Housing Laws
 2. Privacy/Confidentiality Issues
 3. Crime Statistics and Transient Social Conditions
Urman v. South Boston Savings Bank 424 Mass. 165 (1997)
 4. Non-Physical Stigmas

VI. Avoiding Liability

- A. Complying with the Law
- B. Avoid Giving Legal Advice and Legal Drafting

- C. Complete and Truthful Representation
- D. Keeping Records
- E. Citing the Source of Information
- F. Relying on Public Record
- G. Directing questions to the Seller
- H. Disclosure by the Seller
- I. Disclosing and Documenting Conflicts of Interest

Statutes and Regulations

M.G.L. c. 93A
940 C.M.R.
M.G.L. c. 112, Section 87PP – 87DDD1/2
254 CMR 2.00-7.00

Cases for Discussion:

Commonwealth v. DeCotis, 366 Mass. 234 (1974)
Lantner v. Carson 374 Mass. 606 (1978)
Nei v. Burley 388 Mass. 307 (1983)
Piccuirro v. Gaitenby, 20 Mass. App. Ct. 286, 292 (1985)
Underwood v. Risan 414 Mass. 96 (1993)
Urman v. South Boston Savings Bank 424 Mass. 165 (1997)

Other Sources

The Real Estate Desk Book, A Broker's Guide to Consumer Protection, Procuring Cause and Commissions, Philip S. Lapatin, Esq., Greater Boston Real Estate Board, 1999

RE05RC01 Contract Law

I. History of Contract Law

II. What is a contract?

1. voluntary agreement or promise.
2. Parties to the Contract
3. Requirement of competency of parties
4. Must be for legal purposes
5. consideration

III. Types of Contracts

1. Express – the parties state their terms and show their intentions in words.
 - a. written
 - b. oral
2. Implied – the agreement of the parties is demonstrated by their:
 - a. acts
 - b. conduct.

IV. Classification of Contracts

1. Bilateral
2. Unilateral
3. Executed
4. Executory

V. Elements of a Contract

1. A competent party
2. Offer
3. Acceptance
4. Consideration
5. Legal object
6. Consent –

VI. Minimal Requirements of a contract

For a contract to be valid and enforceable under the Massachusetts Statute of Frauds, you must have a written memorandum with following minimal requirements:

1. A writing
2. Must identify the parties
3. Accurate description of property

4. Recital of consideration
5. Must be signed by the party to be charged
6. Basis for rescission
 - a). misrepresentation
 - b). fraud
 - c). undo influence or duress

VII. Validity of Contracts

1. valid
2. void
3. voidable
4. unenforceable –.

VIII. Types of real estate contracts

1. Listing Contracts

- a) Exclusive right to sell
- b) Exclusive agency
- c) Open listing
- d) Net Listing (illegal)

2. Buyer Representation Contract

- a) Exclusive buyer agency agreement
- b) Exclusive agency buyer agency agreement
- c) Open buyer agency agreement.

3. Offer to Purchase

a). Key Terms:

- i. Parties
- ii. Dates
- iii. Legal description of property
- iv. Contingencies
- v. Price
- vi. Earnest money
- vii. Terms
- viii. “Time is of the Essence”

b). Types of Offers

- i. Counter
- ii. Back-up
- iii. Multiple offers
- iv. Letter of Intent
- v. Options

4. Purchase & Sale Agreement (more detailed contract☺)

- a) Parties (identification of buyers and seller)

- b) Description of property
- c) Consideration
- d) Time for performance and possession
- e) Title Deed
- f) Adjustment (proration of taxes, utilities, fuel, insurance etc.)
- g) Casualty loss
- h) Default provisions
 - i. Opportunity for cure
 - ii. Liquidated damages
- i) Contingencies clauses
- j) Construction of agreement
- k) Dates and signatures

IX. Termination

- a) Performance of the contract.
- b) Expiration of the time for performance.
- c) Partial performance with written acceptance by other party.
- d) Substantial performance.
- e) Impossibility of performance.
- f) Rescission
 - i. By mutual agreement
 - ii. Unilateral.
- g) Operation of law.
- h) Breach of contract.

X. Remedies for Breach

1. At Equity

- a). specific performance
- b). injunction
- c). rescission
- d). lis pendens
- e). vendor/vendees lien

2. At Law

- a). monetary damages
 - i. expectation
 - ii. benefit of the bargain
 - iii. lost opportunity/profit
 - iv. damages/losses suffered
 - v. replacement

Instructor Notes:

Instructors are responsible for maintaining their own curriculum to keep abreast of changes in the law. Instructors are encouraged to “teach” to the class and treat this as a basic introduction or advanced course. Instructors may wish to use sample form

contracts, articles or other copyrighted material as handouts. Instructors are responsible for seeking copyright permission prior to using any copyrighted materials.

Authority

M.G.L. c. 251 Section 1, et al. Statute of Frauds

M.G. L. c. 183, Section 1, et al, Deeds and Conveyance

Important Cases for Discussion:

Tristram's Landing Inc. v. Waite, 367 Mass. 622 (1975)

Underwood v. Risan 414 Mass. 96 (1993)

Urman v. South Boston Savings Bank 424 Mass. 165 (1997)

Kelly v. Marx 428 Mass. 877 (1999)

McCarthy v. Tobin, 429 Mass. 84 (1999)

Secondary Sources

The Real Estate Desk Book, A Broker's Guide to Consumer Protection,
Procuring Cause and Commissions, Philip S. Lapatin, Esq., Greater
Boston Real Estate Board, 1999

The Standard Forms Guide, Philip S. Lapatin, Esq., Greater Boston Real Estate
Board, 1991

RE07RC01 Closing and Settlement

- I. Role of the Closing/Settlement in the Real Estate Cycle (Listing, Showing, Offer and Acceptance, Purchase & Sale Agreement, Financing, Title Search, Closing/Settlement)
- II. Sellers Closing Cost and Responsibilities:
 - A. Deed
 - B. Real Estate commission
 - C. Proration of Water, Sewer & Taxes (math examples)
 - D. Recording fees
 - E. Sellers Attorney fees
 - F. Mortgage payoff
 - G. UFFI Certificate
 - H. Smoke detector
 - I. Certificate of Title
 - J. Excise Tax Stamps
 - K. Title 5
 - L. Lead Paint forms
 - M. Municipal Lien Certificate (MLC)
 - 1. Condo:
 - a) Condo Documents - Master Deed By-Laws, Rules and Regulations
 - b) (d) Certificate
 - c) Condo Reserve Fund
- III. Buyers Closing Costs and Responsibilities: Inspection costs
 - A. Bank application fee
 - B. Bank Attorney (Title Search)
 - C. Plot plan
 - D. Financing points
 - E. Fuel adjustment
 - F. Buyers Attorney fees
 - G. Title insurance
 - H. Private Mortgage Insurance (P.M.I.) Tax escrow
 - I. Home owners insurance
 - J. UFFI certificate
 - K. Recording fees
 - 1. Condo:
 - a) Master insurance policy
 - b) Advance condo fee
 - c) Condo reserve fund (transfer or assign)
 - d) Check to make sure pets OK etc. in by-laws

RERC04 Closing and Settlement (continued)

I. Documents at Closing:

- A. Deed
- B. Mortgage Deed
- C. Mortgage Note
- D. Mortgage Discharge
- E. Municipal liens certificate
- F. Attorney certification of title
- G. RESPA Settlement Statement
- H. UFFI Statement
- I. Plot plan
- J. Insurance Policy/Binder
- K. Lead Paint certification
- L. Truth-In-Lending disclosure
- M. Affidavit of Purchase & Vendor
- N. W - 9's
- O. Application form
- P. Commitment letter
- Q. Title insurance
- R. Condo Certificate
- S. Death Certificate or Power of Attorney (For Probate Properties)
- T. Power to Sell (For Probate Properties)

II. Settlement Statement:

- A. Distribution of a completed RESPA Settlement Statement is
- B. recommended for class/case discussion

III. Review Broker's role and impact on the closing process at the following

- A. stages:
1. Listing
 2. Showing
 3. Purchase and Sale Agreement
 4. Bank Application and Approval
 5. Bank Attorney[Title Search
 6. Scheduling of closing Re - other property closing Purchase and Sale date; Coordination of all Parties, Occupancy

Suggested Handouts: Completed model closing Attorney package including RESPA Settlement Statement HUD-1 Form

RE08RC01 MASSACHUSETTS REAL ESTATE LICENSE LAW AND REGULATIONS

1. Licensing Requirements

- A. Massachusetts General Law Ch. 112 sec. 87PP – 87DDD1/2
- B. Code of Massachusetts Regulations 254 2.00 et. seq.
 - 1) Pre-license education
 - 2) Examination
 - 3) 1 year affiliation
 - 4) Exceptions
 - a. Massachusetts attorney
 - b. Massachusetts law school student
 - c. Reciprocity
- C. Business entities
 - 1) Limited Liability Companies and Partnerships
 - a. Insurance requirements
 - 2) General and Limited Partnerships
 - 3) Corporations
 - 4) Sole proprietorships

2. What constitutes practice of real estate?

- A. Sale, lease, exchange of an interest in real property – MGL Ch. 112, sec. 87PP
- B. Exemptions from license requirement
 - 1) Property managers while acting under a contract
 - 2) Principals (buyer or seller)
 - 3) Developers selling their own property
- C. Gifts and Inducements
 - 1) From brokers only
 - 2) To principals (buyer/seller)
 - 3) Agents prohibited from sharing compensation with those who need to be licensed but are not.
- D. Co-broker relationship allowed across borders with duly licensed broker of other jurisdictions

3. Disclosures

- A. Agency disclosure
 - 1) Providing written disclosure at first personal meeting to discuss a specific property
 - 2) Buyer / Seller Agent
 - a. Using the State mandated form
 - 3) Dual Agent
 - a. Obtaining written consent
- B. Fee disclosure to prospective tenants
- C. Disclosure of all fees and Commission
- D. Broker or salesperson personal or familial interest

4. Handling money

A. Deposits

- 1) Accepted offers
- 2) Purchase and sales agreements

B. Escrow funds

- 1) Commingling prohibited
- 2) Record keeping
- 3) Interest and non-interest bearing accounts
- 4) Only brokers have the authority to access funds

C. Disputes

- 1) Purchase and sales agreement to govern
- 2) MGL Ch. 112, sec. 87AAA (d)

5. Board disciplinary authority over agents relating to practice

A. MGL Ch. 112 sec. 87AAA

B. 254 CMR 3.00

C. Highlights of disciplinary authority

- 1) Misrepresentation
- 2) Undisclosed principal
- 3) Undisclosed dual agent
- 4) Failing to account for or remit funds
- 5) Paid commission to unlicensed person
- 6) Undisclosed commission
- 7) Inducing a party to break a contract
- 8) Commingled funds
- 9) Failed to provide purchase and sales
- 10) Discriminatory practices
- 11) Net listing
- 12) Practicing while impaired
- 13) Practicing while the license is expired
- 14) Falsifying license applications and license renewal applications
- 15) Failing to report a criminal conviction

6. Active/Inactive license

A. MGL CH. 112, sec. 87XX1/2

B. Continuing education requirement

C. Affiliations

- 1) Notice to Board
- 2) Salespeople may not affiliate with more than one broker at a time
- 3) Inactive licensees prohibited from affiliating

D. Referral fees

- 1) Inactive sales and brokers may collect referral fees from Active brokers
- 2) Active salespeople must be affiliated in order to practice and may only be compensated by the broker with whom they are affiliated

7. Professional standards of practice

- A. Address reporting
- B. Business Name
- C. Display of license
- D. Salesperson may not practice unless affiliated
- E. Advertising
 - 1) Broker identification
 - 2) Salesperson prohibited
 - 3) Discrimination prohibited
- F. Record keeping
- G. Conveying offers
- H. Attorney services

Suggested handouts and reference materials: MGL ch. 112 sec. 87pp through 87DDD1/2 inclusive, 254 CMR

RE09R01 RESIDENTIAL RENTAL AGENCY

This course is designed specifically for Real Estate Brokers and Salespersons who practice rental brokerage. Rental of real estate, with certain limited exceptions, requires that the individual showing the property and assisting in the rental be licensed. Although Agency Disclosure is not required in the rental of a property, brokers and salespersons are “agents” and need to consider to whom their fiduciary duties lie, landlord, tenant or both as a Disclosed Dual Agent. A large volume of complaints at the Division of Professional Licensure deal with residential rental transactions and rental agents need to maintain competency and understanding of their legal obligations as a licensee and public accommodations under the Fair Housing Laws.

I License Requirements

A. Rentals require license.

M.G.L. c. 112 Section 87DDD1/2.

No person shall engage in the business of finding dwelling accommodations for prospective tenants for a fee unless such person is a licensed broker or salesperson as defined in section 87PP of chapter one hundred and twelve.

II. The Fee Disclosure Requirement: Written Disclosure to the Prospective Tenant

a) First Personal Meeting

b) To Discuss Property

1. State whether the prospective tenant will pay a fee for brokerage services
2. The amount of the fee
3. Manner and time which the fee is due
4. Whether or not the fee will be payable regardless whether or not a tenancy is created
5. Signed by the broker or salesperson, including license number and date of notice
6. Signed by the prospective tenant, or noting refusal to sign

III. Types of Apartment Listings

a) Exclusive Written

b) Open, Non-exclusive, often not written

IV. Agency

a) Brokers and Salespeople as “Agents”

b) Agency does not require:

- i. Written agreement, or
- ii. Payment

c) Who do you represent?

- 1) Agency Duties to Client:

- a) Obedience
- b) Loyalty
- c) Disclosure
- d) Confidentiality
- e) Accountability
- f) Reasonable Care and Diligence

2) Duties to Customers

- a) Honestly and Ethically (254 CMR 3.00(11))
- b) Disclosure
 - i. Lead Paint
 - ii. UFFI
 - iii. Fee Disclosure
 - iv. Physical Defects in Property

V. Screening Tenants/Application Process/Inception

A. Fair Housing/Rental Concerns

- 1) Brokerage as Public Accommodation
- 2) Fair Housing
- 3) Section 8
- 4) Lead Paint and Children
- 5) Other Protected Classes
- 6) Lead Paint Tenant Notification, Landlords Rights and Responsibilities

B. Preparation/Delivery of Premises

- 1) Inspection of Premises by Owner or Agent
 - a) Condition
 - b) Abandoned property
 - c) Hold-over tenants
 - d) Board of Health Inspection

C. Environmental

- 1) Lead
 - a) Inspection
 - b) Disclosure/Tenant Notification Certification
 - c) Duty to delead
 - d) Financial Assistance to Landlord's
- 2) UFFI Disclose

D. Warranties, Safety and Habitability

- 1) Warranty of Habitability
- 2) Sanitary Code
- 3) Safety and Security Issues
- 4) Use and Enjoyment

VI. Lease v. Tenancy at Will/Terms

- A. written v. oral
- B. Lease
- C. Tenancy
- D. Subsidized Tenancy Agreements
- E. Tax Escalation Clauses
- F. Utilities
- G. Late Payments
- H. Reserving the Right of Entry in a Written Lease
 - 1) Limitations
 - 2) Who may enter
 - 3) Purpose of Entry
 - 4) Timing – No Statutory Rule Tenant be Given 24 hour notice
 - 5) “Reasonable Notice” MGL Chapter 186 section 15B
- I. Rent Withholding / Repair and Deduct

VII Deposits

1. What a Landlord may take at the inception of the Tenancy:
 - A. First Months Rent
 - B. Last Months Rent
 - C. Security Deposit
 - D. Lock/Key Deposit
 - E. Illegal Deposits are anything more than stated above regardless of what they are called: Cleaning Deposit, Pet Deposit, etc.
 - F. Transfer of Deposits
2. Statements and Interest
 - A. Security Deposit
 - 1) Receipts
 - i. A receipt must be given for the Security Deposit
 - ii. Receipt must identify the Massachusetts bank where Deposit is held, notice must include bank address, account number and amount of deposit
 - iii. Deposit must be held in an interest bearing Massachusetts
 - iv. Tenant is entitled to 5% interest or whatever lesser amount the bank pays in interest, to be paid annually. If landlord fails to pay the interest, tenant may deduct from next rent payment.
 - v. Interest is only due to the Tenant after the Security Deposit has been held for more that one year.
 - vi. Records
 - 2) Apartment Condition Statement
 - i. Upon receipt of
 - B. Last Months Rent

VIII Terminating Tenancies, Eviction and Summary Process

- A. Termination by Agreement/Fixed Term Lease
- B. Notices to Quit
 - 1) Terminating Tenancies at Will/30 day or rental period
 - 2) 14 Notice to Quit for Non-Payment
 - 3) Violating Lease Terms
- C. Retaliation/Self Help Eviction
- D. Summary Process
 - 1) Role of Lawyer and Prohibition of unauthorized practice of law
 - 2) Complaint
 - 3) Answer
 - 4) Judgment
 - 5) Execution
 - 6) Stays of Execution
 - 7) Eviction
- E. Storing Property/Abandoned Property
- F. Consumer Protection Statute

Authority

M.G.L. c. 112, Section 87PP – 87DDD1/2
 254 CMR 2.00-7.00
 M.G.L. c. 186, Sections 1-21 (Residential Rental)
 M.G.L. c. 111, Sections 189A-199B (lead)
 105 CMR 410 Sanitary Code

Important Cases for Discussion:

Boston Housing Authority v. Hemingway 363 Mass. 184 (1973)
Berman & Sons, Inc. v. Jefferson 379 Mass. 196 (1979)
Attorney General v. Brown 400 Mass. 826 (1987)
Gnerre v. Massachusetts Commission Against Discrimination 402 Mass.
 502 (1988)
Attorney General v. Dime Savings Bank of New York, 413 Mass. 284
 (1992)
Cruz Management Company, Inc. v. Thomas 417 Mass 782 (1994)

Suggested Handouts

Landlord Rights and Responsibilities Massachusetts Association of
 REALTORS® and Massachusetts Office of Consumer Affairs and
 Business Regulations
Tenant Rights and Responsibilities Massachusetts Association of
 REALTORS® and Massachusetts Office of Consumer Affairs and
 Business Regulations

RE10RC01 General Real Estate Laws, Regulations and Practices

I. DOCUMENTS/DISCLOSURE ISSUES:

A. Offers

1. Offers
2. Multiple Offers
3. Counter-Offer
4. Back-Up Offers

B. Agency Disclosure

- 1) first personal meeting between a broker or salesperson and a prospective purchaser or seller
- 2) for the purpose of discussing a specific property.
- 3) Describe agency relationships
- 4) Consumer signs or note refusal to sign
- 5) Name of licensee, license number and date of disclosure
- 6) Not a Contract
- 7) Disclosed Dual Agency requires informed consent
- 8) Record Maintenance

C. Apartment Rentals

1. first personal meeting between the broker and salesperson and a prospective tenant.
2. state whether either the prospective tenant will pay any fee for services
 1. the amount of the fee
 2. manner and time which the fee is due
 3. whether or not a fee will be payable whether or not a tenancy is created
4. be signed by the broker or salesperson including license number and date of notice
5. be signed by the prospective tenant, or note if and why they refused to sign
6. Record Retention

D. Sex Offender Registry:

E. Personal Relationships (family)

II GENERAL DISCLOSURE:

A Chapter 93A: The Consumer Protection Statute

- 1) History of Caveat Emptor and Consumer Protection
- 2) Persons subject to the Statute
- 3) Persons not subject to Statute
- 4) Mechanics and Procedures
- 5) Attorney General Consumer Protection Regulations

B. Unfair and Deceptive Trade Practices

C. Disclosure Requirements

D. Statutes and Case Law

1. Underwood v. Risan 414 Mass 96 (1993) Supreme Judicial Court
2. Urman v. South Boston Savings Bank 424 Mass 165 (1997):
3. The Stigmatized Property Bill has been enacted as: Chapter 294 of Acts of 1998
AN ACT URTHER REGULATING THE DISCLOSURE OF CERTAIN INFORMATION IN REAL ESTATE TRANSACTIONS

III HANDLING MONEY:

A. Client Funds

1. Escrow Accounts
2. Deposits
3. Interest
 - a) belongs to parties
 - b) "follows the money"
 - c) defined in contract
4. Timing
 - a) immediately
 - b) written acceptance of offer to purchase or rent
5. Bookkeeping Requirements

B. Disputes/Interpleader

IV DEPOSITS AT INCEPTION OF TENANCIES

A. First Months Rent

B. Last Months Rent

- 1) Receipts
- 2) Bookkeeping
- 3) Interest

C. Security Deposit

- 1) Receipts
- 2) Condition Statement
- 3) Bookkeeping
- 4) Interest
- 5) Remains property of tenant
- 6) Deduction

D. Lock/Key Deposit

E. Illegal Deposits are anything more than stated above regardless of what they are called: Cleaning Deposit, Pet Deposit, etc.

V. LICENSE REQUIREMENTS:

A) Basics

- 1) Salesperson

- 2) Brokers
- 3) Corporations, LLC, LLPs
- 4) Bonding Requirements
- 5) Insurance
- 6) No Dual Licensure
- 7) Gifts and Inducements

B. Authority of Board of Registration of Real Estate Brokers and Salesmen

C. Advertising:

- 1) Truthful/not false or misleading
- 2) Broker must Self Identify/Nor Blind Advertisements
- 3) Non-Discriminatory

D. Active /Inactive License Status

- 1) Renewing
- 2) Continuing Education Requirement.
- 3) Inactive licensees They may not be actively involved in real estate transaction but the statute allows payment of referral fees to an inactive broker.

Professional Conduct:

- A. Listing Agreements and the Anti-Trust Laws
- B. Net Listings are illegal
- C. Fair Housing Basics
- D. Illegal Conduct/Reporting Convictions

Important Cases for Discussion:

Tristram's Landing Inc. v. Waite, 367 Mass. 622 (1975)
Underwood v. Risan 414 Mass. 96 (1993)
Urman v. South Boston Savings Bank 424 Mass. 165 (1997)
Kelly v. Marx 428 Mass. 877 (1999)
McCarthy v. Tobin, 429 Mass. 84 (1999)

Other Sources

The Real Estate Desk Book, A Broker's Guide to Consumer Protection, Procuring Cause and Commissions, Philip S. Lapatin, Esq., Greater Boston Real Estate Board
The Standard Forms Guide, Philip S. Lapatin, Esq., Greater Boston Real Estate Board

RE11RC01 Antitrust

A. Anti-Trust Laws

Purpose – The purpose of the Anti-trust laws is to promote competition in the marketplace. Competition benefits consumers by keeping prices low and the quality of goods and services high.

- 1) Sherman Anti-Trust Act of 1890
The first American Anti-trust law that forbids “contracts, combinations, conspiracies or agreements” in restraint of trade”. It also prohibits monopolies or attempts to monopolize.
- 2) Clayton Act of 1914 (tying, labor union exemption)
Outlaws business mergers which result in a non-competitive atmosphere. Unlike Sherman Act which deals with current practices, the Clayton Act outlaws activities which *may affect future* restraint of trade.
- 3) Robinson - Patman Act 1936
Forbids *price discrimination* among customers of the same class.
- 4) Federal Trade Commission Act of 1914
(amended in 1930s and 1970s) Allows the law to move against unfair or deceptive practices, or unfair *competition without waiting for someone to actually be harmed by them* (current & future).
- 5) Hart-Scott-Rodino Act – section 7A of the Clayton Act, called Hart-Scott-Rodino Act, requires prior notification of large mergers to both FTC & Justice Department
- 6) Parens Patriae
Attorneys General were given the *full strength* of Federal antitrust powers under “parens patriae”.
- 7) MGL Chapter 93 Section 1-14A
The purpose of the “Massachusetts Antitrust Act” is to encourage free and open competition in the interest of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth. This Act shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable.

B. Four Common Anti-Trust Real Estate Violations

All four are illegal under the “Per Se” rule and no defense of ignorance or lack of illegal intent will be accepted. The presumes that they are violations and condemns them automatically.

1. Price Fixing – an agreement, combination, or conspiracy involving at least two persons who are nominal competitors to fix, set or rig prices (or commissions or fees). There is no such thing as an innocent discussion of commissions.
 - a) In the stream of interstate commerce
 - b) Has an effect upon interstate commerce
2. Group Boycott (must prove) Individual refusals to deal are illegal. Violation of the law even if two or more businesses *just agree* to a boycott... or some coercion of a third competitor. Even a group boycott of someone perceived to be “unethical” is a problem... violation of a private, professional organization’s Code of Ethics should be filed as a grievance with the professional organization... not discussed among competitors.

Consideration to determining violation:

- a) A conspiracy to boycott exist
 - b) Participated in the boycott
 - c) Conspiracy had a sufficient nexus with interstate commerce
 - d) Conspiracy injured the plaintiff
 - e) The approximately amount of damage
3. Dividing the Market – Allocation of customers among two or more competitors, whether the division is based on geography, product lines, astrological sign or other criterion.
 - a) Allocation of markets
4. Tying Arranging

Dominance in the market forcing consumers into purchasing a “tied” product in order to obtain the “tying” product.
5. elements of a per se tying claim:

- a) Two separate and distinct products, a “tying” and a “tied” product;
- b) The buyer being forced to buy the tied product to get the tying product;
- c) The seller possessing sufficient economic power in the tying market to coerce buyer acceptance of the tied product;
- d) Involvement of a ‘not insubstantial’ amount of interstate commerce in the market of the tied product;
- e) The tying company has an economic interest in the tied product (anti-competitive effect in tied market).

C. Three Elements to Anti-Trust Violations

- 1. Combination or Conspiracy
 - a) Existence of concerted action by knowing participant
 - b) A specific intent to monopolize
 - c) An overt action
- 2. In Restraint of Trade
 - a) Limits ability to do business
- 3. Which is Unreasonable
 - a) Causing damage to injured party

D. Anti-Trust Laws are Administered by:

- 1. Federal Trade Commission
- 2. Department of Justice
- 3. State Attorney General

E. Violations

- 1. Per se

Illegal on the face – anti-competitive effect need not exist, only an agreement is needed. Example would be a verbal or written

agreement between two competitors to fix prices and /or divide the market. For this, one does not have to establish an anti-competitive effect... just the agreement itself is enough to determine a violation.

Per se rules requires the court to make broad generalizations about the social utility of particular commercial practices. The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its' pro-competitive consequences.

agreement to boycott competition
agreement to fix prices
tying one product to another

2. Rules of reason

Is as its' name suggest, the rule of reason requires the fact finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint of trade.

Cannot be overly subjective which would exclude otherwise qualified.....

Only a court may declare an action illegal under the Rule of Reason.

- (a) customer/client
 - establishing commission rate
 - other listing policies
 - length of listing
 - type of listing
- b) competitors
 - commission splits
 - boycotts
 - horizontal mergers and agreements
- c) other service providers
 - tying arrangements
 - vertical mergers and agreements

F. Enforcement

Federal Violations

1) Sherman Act

A. Criminal

1. Fines (not tax deductible):

- a. Corporate: up to \$1,000,000
- b. Corporate officers or directors: Up to \$5,000 and/or prison up to 1 year
- c. Individual: Up to \$100,000 and/or prison up to 3 years

B. Civil

- 1. Treble damages (two-thirds not tax deductible) available in actions by private persons
- 2. Award of attorney's fees available in actions by private persons
- 3. Court costs available in actions by private persons
- 4. Interest on actual damages available from date of complaint in actions by private persons or Government
- 5. Injunction available in action by Government

C. Other

- 1. Loss of individual's right to vote in public elections for felony conviction
- 2. Possible loss of broker's or salesperson's license
- 3. Supervision of your business up to (10 years)

2. Clayton Act

- A. Civil remedies same as Sherman Act
- B. No criminal penalties

3. Federal Trade Commission (FTC) Act

- A. Cease and Desist Order: Prohibits unfair methods of competition or deceptive acts or practices by respondent.
- B. Trade Regulation Rule: Defines acts or practices that violate FTC Act
- C. Civil Penalties

Fines (not tax deductible): Up to \$10,000 for each violation of "A or "B" above

State Violations

1. Criminal

Forty-eight states have criminal anti-trusts laws, some of which allow for fines up to \$1,000,000 for corporations, and \$100,000 for individuals, and prison terms up to 3 years

2. Civil

A. Forty-four states allow both the State and an individual to sue. Forty-six states provide for injunctions.

B. Parens Patriae

Attorney General of any state may bring a civil suit on behalf of the citizens of the state seeking damages identical to those available to any private person.

3. Massachusetts

A. Criminal

1. Fines (not tax deductible)

a. Corporate: up to \$100,000

b. Individual: up to \$25,000 and/or prison up to 1 years

B. Civil

a) Treble damages

b) Award of reasonable attorney's fees

c) Court cost

d. Injunctive relief and stay

Any individual harmed may bring private action – need not be the Atty. General.

G. Risk reduction

The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers/salespeople are engaged in an illegal conspiracy:

1. I'd like to lower the commission rate, but our professional association has a rule....
2. "This is the rate that everyone charges."
3. The Listing Service will not accept less than a 120-day listing.
4. "Before you list with XYZ Realty, you should know that nobody works on their listings."
5. If John Doe was really professional (or ethical), he would have joined our professional association.
6. "The best way to deal with John Doe is to boycott him."
7. No member of our professional association will accept a listing for less than ninety days.
8. "Let him stay in his own market. This is our territory."

The above examples are taken from NAR "Antitrust Compliance Program" booklet. Some of the examples are not literal but capture the essence of the publication.

1. Do not discuss fees, charges, or business practices with competitors anywhere. This includes tennis courts, golf course or during a house party.
2. Be clear and specific in all written correspondence.
3. Be sure you know what you are talking about and to whom.
4. Avoid conversations about how commissions were negotiated and how you reached your own office decisions with anyone but the folks in your own firm.
5. Do not keep dual or secret files of documents.

Other Sources: NAR Antitrust Compliance Program booklet.
 NAR "Antitrust and Real Estate Manuals" Volume I & II
 NAR Video "A Look at the Law"
 Bonnie Sparks –

Links: www.state.us.ma/legis/

RE12R01 Condominiums, Cooperatives and Timeshares

A. WHAT IS A CONDOMINIUM:

B. PROPERTY INTERESTS IN CONDOMINIUMS

1. Real Property Interests

a. Unit –

b. Common Areas -

2. Personal Property Interests: -

◆ Examples: *Clubhouse furniture, basketball hoop, picnic tables*

C. How A Condominium is Created:

In Massachusetts a condominium is created under the provisions of Massachusetts General Laws (MGL), Chapter 183A.

The documents and instruments that create, describe, and establish the framework for governance:

1. Master Deed:

This is the legal instrument that transfers property to condominium ownership and describes: *Each is different but follows a familiar pattern according to the powers of the statute. The deed includes:*

- ◆ *Description of land and buildings*
- ◆ *What you own and what's common area*
- ◆ *Description of limited common elements*
- ◆ *Determination of percentage interest*
- ◆ *Architectural and use restrictions*
- ◆ *Outline of managing entity*
- ◆ *Protection of first mortgagees*
- ◆ *Plat/ plot plan*
- ◆ *Amendments*

In Massachusetts, the % interest is determined by the market value at the time of recording of the deed. (Overhead)

2. Unit Deed:

The individual Unit Deed is the document that provides the unit buyer with the following basic rights and obligations:

- ◆ *Right of ownership and % interest*

◆ *First time conveyed, has floor plans attached*

3. The Declaration of Trust (The Bylaws)

This is the document that establishes the Condominium Association and its legal authority. Most Condominiums in Massachusetts are set up as trusts with trustees. If the association is to be incorporated, the Articles of Incorporation will establish the association and its organizational structure.

Describes obligations and powers of the Trustees, procedures for maintenance and repair of the unit and common areas, insurance requirements, association meetings, and voting rights, handling of common area expenses, reserve funds, and assessment of unit owners.

4. Rules and Regulations: *Summarize important provisions of the trust which govern the conduct of residents, guests, and tenants.*

5. Amendments

D. THE ANNUAL BUDGET:

1. Reserves

a. Capital – *allocation of funds for maintenance of the common area*

b. Contingency–*reserves that cover emergencies that aren't foreseen or in the budget*

Note: language typically included in the P & S explaining that the conveyance of the condo shall be deemed to include the Seller's allocable share of reserve funds held by the organization of unit owners. This is explained to Seller when a listing is taken.

2. Condominium Fees - *Determined by the annual budget; usually paid monthly. Owners are typically assessed expenses according to their % interest.*
(Overhead)

3. 6 (d) certificates - *refers to section of M.G.L. 183A, verifies owners payment status of fees and assessments.*

4. Special Assessments - *\$ needed above and beyond the current budget and reserves to replace a capital item. Any now paid? Any to be considered?*

E. Insurance Policies:

1. Master Insurance Policy – *Property and liability coverage for common areas*

2. Unit Owner's Policy – *Real and personal property and liability for unit owner*

F. Unit Taxes:

Paid individually by unit owners – usually based on both the tax assessment and % share of common area. If valuation of common area was taxed directly to the association, it would be passed on to the owners through the condo fee.

G. Right of First Refusal:

Some condominium documents, in the Master Deed, or in the Declaration of Trust, contain an element called “Right of First Refusal” which guarantees to the association or its members the right to buy a unit under the same terms and conditions as set forth in a bona fide contract with a potential purchaser of that unit, provided the right is exercised within the time period specified in the documents.

1. Letter of Declination - *Waiver of right of first refusal; required at closing*

H. Condo Super Lien Bill (Chapter 400 of M.G.L. 183A):

1. Priority of Lien - *Signed into law in 1992 – the most sweeping revision of the Mass. Condo Law since its enactment. Gives condo associations the authority to impose a “priority” lien (taking precedence over the first mortgage on the condo unit) on owners who fail to make required common-area payments. In order for costs and fees to be a super-priority item, a notice to the owner and first mortgagee after 60 days of delinquency and a separate notice to the lender 30 days before filing the lien foreclosure action. If the association were to proceed to a lien enforcement sale of the unit, the effect would be to wipe out the first mortgage. However, payment at any time of the super-priority amount will eliminate the super-priority. This provision is intended to balance the interests of associations and lenders. Important for a condo association to have legal counsel involved to serve the proper notifications and monitor the process.*
2. Unit Owner’s Liability - *Explicit recognition that fines, losses and costs of enforcement for a unit owner’s (or tenant or guest’s) misconduct will constitute a lien.*
3. On File Documents – *The association, in the custody of the trustees or management company, must keep up-to-date copies of the recorded master deed, by-laws and amendments, a minute book of the association meetings, and financial records, contracts for work or services to be provided to the association, and insurance policies. These records must be made available for inspection by unit owners and first mortgagees, including a right to copy at the requesting party’s expense.*
4. Management Obligations - *Management contracts must provide for the right of the Board to terminate the contract for cause with 10 days notice (but giving that amount of time to cure) and 90 days (or less if the contract permits) to terminate without cause.*

6(d) Certificates must be furnished within 10 business days after a written request.

I. Condo Conversion Statute- *EMERGENCY LEGISLATION, APPROVED IN 1983 (ST. 1983, c.527)*

1. Major Conversion Provisions- *Applies to co-ops as well as condos; doesn't apply to buildings containing less than 4 residential units-Review highlights of the law, including tenants have a period of time to purchase on terms and conditions the same or more favorable than those extended to the general public.*

2. Protected Classes

a. Elderly, Handicapped, Low or Moderate Income – 62 years+. *Physically handicapped, income less than 80% of median income for the area set forth in HUD regs.*

b. Time to Vacate- *1 year for non-protected classes; 2 years for protected classes*

c. Moving reimbursement *-Up to \$750.00 of documented expenses for non-protected classes; up to \$1,000 for protected classes. Tenant has to be up-to-date on rent payments and voluntarily vacate before end of notice period to be eligible for reimbursement.*

****Any city or town may impose their own conversion regulations in lieu of this statute (Use example such as recent adoption of condominium conversion ordinance by city of Boston).**

J. Cooperatives:

Unlike condominiums, residents do not own their units, but instead, own shares in a corporation that owns the building.

1. The Proprietary Lease –*Spells out the number of shares a Buyer will own and states that those shares entitle him to occupy a certain space and have access to the building facilities. At closing, the Buyer receives a proprietary lease and stock certificates.*

2. Monthly Fees –*Amount determined by # of shares. The allocation of shares is determined by unit size, location, condition, and amenities. The monthly fee covers maintenance, repairs, improvements, as well as payment of real estate taxes and interest on the underlying mortgage for the building(if applicable).*

3. The Board of Directors- *Elected from shareholders; oversees management, may have a managing agent, has the authority to approve or disprove a prospective*

purchaser – scrutinizes a prospect's financial documents – in a privately owned co-op (no government agency subsidy) has the right to reject anyone they feel will alter the quality of life of the co-op as long as the reason doesn't involve discrimination against a protected class (example of Cher and Richard Nixon)

4. Financing Issues -

Higher risks to shareholders in case of co-op owner default on payment - the difference need to be made up by other shareholders. The bank financing co-op loans is in second position to the bank holding mortgages on the building. The Board establishes the amount of financing allowable for unsubsidized market rate condominiums. More limited availability of co-op financing, because the only collateral is the lease and the stock certificates.

Activity coop - condo comparison list

K. Time Sharing:

Started in the French Alps in the 60's, time shares spread through Europe and reached the United States in the early 70's.

1. Ownership (Fee Simple)- *The Buyer buys his unit outright for the specified week or weeks spelled out in his contract. He has a deed, title, and title insurance. He can rent or sell his timeshare for profit or leave it as part of his estate. He will pay real estate taxes and mortgage interest just as in a regular condo purchase, but the deductions are based on the fraction of the year he actually owns. Majority of time shares are purchased with a personal loan. Loans for both ownership and right-to-use plans are unsecured consumer loans.*

2. Right to Use (Leasehold Interest)- *Right to use every year for the specified period of time. Upon expiration of the lease period, the property reverts back to the Owner. With both types of time shares, there is usually an annual maintenance fee.*

3. Exchange Programs-

- ◆ *External – independent service with a membership fee*
- ◆ *Internal – in-house service for affiliated resorts*
- ◆ *Trading Network – system where owners make direct arrangements to swap units with one another*

4. Example: Marriott's Custom House
(Overhead)

L. Due Diligence Issues and Fiduciary Duties:

1. Provision of access to condo docs and provision of information about rental guidelines, pets, assigned versus deeded parking.

2. Fiduciary Obligations of Buyers Agents to provide analysis of market value, alert buyer to potential issues of concern, including financial health of the complex, average length of time for units on market in complex, vacancy rates, if applicable, and % of owner-occupied units.

BE PREPARED TO ANSWER THESE IMPORTANT QUESTIONS:

What is included in the condominium fee?

What are the approximate utility costs for the unit?

Are utilities metered separately or included in the fee?

Is the parking deeded or assigned?

Is there guest parking?

Are pets allowed?

Can I rent out my unit?

What are the arrangements for trash/refuse disposal?

What are the arrangements for snow removal?

Is there a security system?

Is there extra storage?

How is mail and parcel delivery handled?

What is the percentage of owner-occupied units?

RE14R01 ARCHITECTURE - 1640 to Present

I. First Period (Post Medieval) 1640-1725

- A. The English roots
- B. Appearance and style
 - 1. One cell house
 - 2. Hall and parlor
 - 3. Lean-to
 - 4. Chimney appearance and location
- C. The house frame
 - 1. Post and beam construction
 - 2. Chamfers and chamfer stops (lamb's tongues)
- D. Establishing a date

II. Second Period (Georgian) 1725 - 1790

- A. English influence and pattern books
- B. Appearance
 - 1. Boxed frame
 - 2. Raised field paneling
 - 3. Double hung windows
 - 4. More flexible floor plans
 - 5. Changes in the chimney
 - 6. Roof variation

III. The Third Period (Federal) 1790-1830

- A. English derivation, the Adam brothers
- B. The American architects

1. Bullfinch
2. McIntire

C. Pattern books

1. English
2. American (Asher Benjamin)

D. Invention of the nail machine

E. Benjamin Thompson (Count Rumford) and fireplace improvements

F. Appearance

1. Changes in color and ornamentation
2. Mantles and wainscoting
3. Floorplans

IV Greek Revival 1830-1865 (The Democratic Style)

A. Inspired by Greek ideals and democratic philosophy

B. The temple look

C. Changes in the floorplan and appearance

1. The gable end faces the street
2. The front door is in the gable end of the house

D. Introduction of stoves for heating and cooking

E. Phasing out of fireplaces

V. The Victorian Era 1840-1900

A. Gothic 1840 1865

1. New color schemes
2. Houses integrated with the landscape

3. Designing from the inside out
4. Balloon framing
5. Chimney details
6. Alexander Jackson Downing

B. Octagon 1860-1870

1. Invention of Orson Squire Fowler
2. Odd spaces and belvederes
3. Not many survive

C. Italianate 1855-1880

1. Floorplan similar to Greek Revival
2. Bracketed decoration (The bracketed style)
3. Dependence on stove heat
4. Heaviness of detail

D. French Second Empire (Mansard)

1. Popularity of France, restoration of Paris
2. Appearance
 - a. Mansard roofs,
 - b. Brackets
 - c. Absence of fireplaces
3. Popularity

E. Stick Style

1. Type of decoration
2. Influence of Charles Eastlake
3. Respect for honesty and truthfulness depicted in house

F. Queen Ann 1880-1895

1. Appearance
 - a. Variety of windows

- b. Roof lines
- c. Exterior finishes
- d. Interior finishes (open floor plan, pocket doors)
- e. Porches, towers and kiosks

2. The culmination of Victorian detail and machine made decoration

G. Shingle style 1885-1900

- 1. Influence of Henry Hobson Richardson on this style
- 2. Use of natural materials
- 3. Looking back at the past

VI. The Twentieth Century 1900-1950

- A. New appreciation for the past
- B. The Arts and Crafts Movement
- C. Utilitarian versus romantic
- D The styles

- 1. American foursquare/ colonial revival 1900-1930
- 2. The bungalow 1910-1930
- 3. The homestead house 1900-1940
- 4. Romantic revivals 1900 to present
 - a. Georgian
 - b. Dutch
 - c. English (Cottswald cottage, manor, half timbering)
 - d. French
 - e. Spanish (mission)
 - f. Swiss chalet

5 Prairie Style and Frank Lloyd Wright 1900-1950

6. International style and the Bauhaus School 1932

VII. Post W.W.II 1950 to present

- A. Leavittowns

- B. California ranches
- C. Post modern
- D. Earth sheltered berm houses
- E. Mobile homes
- F. Modulares and factory made houses
- G. Split level and split entry
- H. Revivals and reinterpretations
 - 1. Colonial (Georgian)
 - 2. Victorian
 - 3. Shingle

RE15R01 SELLING HISTORIC PROPERTIES

I. Using the right terms

II. Dealing with regulations and zoning

- A. National Register Districts
- B. Local Historic Districts
- C. Deeded covenants
- D. Demolition delay

III. Common Problems of Old Houses

- A. Bad sills and corner posts
- B. Bug damage Old house borers, powder post beetle, termites and ants
- C. Deteriorated windows When to repair and when to replace
- D. Sagging floors How much sag is tolerable
- E. Unsafe chimneys and finding the right mason
- F. Lead Paint What to save and what to remove
- G. Insulation When and where to insulate
- H. Roofing and flashing

IV. Where to Find Information

- A. Massachusetts Historical Commission (Inventory of houses)
- B. Registry of Deeds (chain of title)
- C. Registry of Probate (household inventories and wills)
- D. Maps (after 1850 with names and house footprint)
- E. Local libraries and museums.

V. Avoiding Myths and Old Wives Tales.

VI. Do's and Don'ts for Historic Houses)

VII. Showing The Old House

A. Starting at the front

B. Don't end in the basement

C. Preparing buyer to be realistic. It is not a new house

VIII. Advertising

A. Writing the ad

B. Where to advertise

C. Cliches to avoid

IX. Choosing Home Inspectors for Old Houses

A. Old houses needs to be measured by a different yardstick.

B. Finding inspectors who respect old as well as the new.

RE16RC01 Zoning & Building Codes

- I. Zoning procedures
 - A. Planning Board
 - B. Board of Appeals
 - C. Variances
- II. Residential building codes areas of coverage
 - A. Plumbing
 - B. Electric
 - C. Various building trades
- III. Building code control
 - A. building permit
 - B. inspections
 - C. occupancy permit
- IV. Interior environmental requirements
- V. Means of egress and fire protection systems
- VI. Foundation systems and retaining walls
- VII. Repair, alteration, addition and change of use of existing buildings
- VIII. Lien
- IX. State sanitary code
- X. In-Law apartments
- XI. In-House businesses
- XII. Special permits
- XIII. Grandfathering

Suggested Handouts: Local zoning book and map

RE17C01 International Real Estate

- A. Factors driving globalization
- B. Foreign investors, who they are and why they buy
- C. Factors in working with foreign investors
 - 1. Language terminology barriers
 - 2. Cultural differences
- D. Government stability
- E. Types of ownership
 - 1. Foreign
 - 2. Domestic
- F. Finance
 - 1. Multi-national banks
 - 2. Currency & exchange rates
- G. Taxation
 - 1. Foreign investor in US real property
 - 2. US investor in foreign real property
 - 3. FIRPTA Tax Returns

RE18RC01 Property Assessments, Valuation and Taxation

- I. Assessments and Valuation
 - A. Property tax rates
 - B. Assessment dates and fiscal years
 - C. Fair cash value
 - D. Evasion of taxation
 - E. Exemption and abatements
 - F. How values are determined
 - G. Classification
 - H. Proposition 2 1/2 implications
 - I. Approaches to value: Sales comparison, cost and income capitalization
 - J. Estimating and forecasting net operating income
- II. Taxation Issues
 - A. Forms of Business Entity - proprietorship, partnership, corporation, trust
 - B. Expenses of doing business - typical deductible expenses and record keeping
 - C. Benefits and consequences of owner occupied residential property
 - D. Capital gain and losses
 - E. Ownership & disposition of income property
 - F. Tax credits available to owners of income producing property
 - G. Sale of investment property

RE19RC01 Fair Housing

I. Federal Fair Housing - 1968 (Title VIII)

A. Protected Classes:

- i. sex
- ii. race
- iii. color
- iv. religion
- v. national origin
- vi. handicap (mental and physical)
- vii. familial status

B. Prohibited Practices

- i. Refusal to sell or rent or otherwise deny
- ii. Discrimination in terms of sale or rental
- iii. Discrimination in advertising
- iv. False denial of availability
- v. "Blockbusting"
- vi. Different terms for loans - including "redlining"
- vii. Varying access to brokers' organizations
- viii. "Steering"
- ix. Appraisal report with value impact on any of above
- x. Making notations indicating discriminatory preferences
- xi. Coercion, intimidation, interference with any person in exercise of rights

C. Property Covered

- i. Residential Property (not commercial)
- ii. Any type of residential property if:
 - 1) Handled by real estate broker (depending on type of property; liability may be only for broker)
 - 2) Discriminatory advertising
 - 3) Any written notice or statement indicating discriminatory preference
- iii. Single-Family Privately owned with broker
 - 1) Privately owned with discriminatory advertising
 - 2) Privately owned with more than one house sold in 2 years
 - 3) Privately owned with more than three houses owned (dealer)
 - 4) Not privately owned (corporate)
- iv. Multi-family
 - 1) Any five or more unit building

- 2) Two to four units, non-owner occupied
- 3) Two to four units, owner-occupied (Liability for broker only, not owner)
- v. Covered multifamily dwellings (for design/construction standards - handicap discrimination)
 - 1) Buildings of four or more units if one or more elevators
 - 2) Ground floor units in other buildings of four or more units

D. Housing Not Covered

- i. Sale or rental of single family by private individual with three or less properties
 - 1) Without a broker
 - 2) Without discriminatory advertising
 - 3) With no more than one house sold in two years
- ii. Rental of owner-occupied two to four family (not covered for owner, covered for owner, covered for broker)
- iii. Sale/rental of property owed by religious organization
- iv. Private club
- v. Housing for older persons - familial status only

E. Enforcement of the 1968 Fair Housing Act

- i. File complaint with HUD
- ii. File civil action in US District Court
- iii. Administrative process (Administrative Law Judge or Civil Action)
- iv. Remedies: civil penalties, damages (actual and/or punitive), injunctive relief

II. Massachusetts General Laws - Chapter 151B

A. Protected Classes

- i. Race, color, religion, national origin, ancestry, sex, age, handicap, marital status, veteran history/military status, sexual orientation
 - 1) Prohibited Practices
 - a) Same as Title VIII
 - 2) Covered property
 - a) Most residential property
 - b) Commercial space (only on basis of- race, color, religion, national origin, sex, sexual orientation, age, ancestry, handicap, marital status)

3) Major exemptions (exemptions apply only to property owners, for real estate agents these exemptions do not apply. Also in the area of discriminatory advertising, these exemptions do not apply in the case of certain protected categories - those also protected under Title VIII)

- a) Lease of owner-occupied two-family
- b) Elderly state/federal funded - age only
- c) Elderly retirement., 10 acres, 55 yrs. - age only

ii. Protected Class - Public assistance or rental assistance reciprocity

1) Prohibited Practices

- a) To discriminate in furnishing credit services or rental accommodations; also, to discriminate because of any requirement of such public assistance, rental assistance, or housing subsidy program.
- b) (For rental subsidy recipients, discrimination may include the following: Refusal to sign program lease, refusal to make modifications in unit to satisfy state sanitary code, requirement for security deposit in excess of program allowance)
- c) Discriminatory advertising

2) Exemptions - None; all property covered

iii. Protected Class - Children

1) Prohibited Practices

- a) Refusal to rent sell or otherwise deny -includes refusals based on lead paint and other safety concerns
- b) Discrimination in terms/conditions
- c) Discriminatory advertising

2) Major exemptions (exemptions apply only to property owners, for real estate agents these exemptions do not apply. Also in the area of discriminatory advertising, these exemptions do not apply.)

- a) Three family or less with elderly (65 yrs. Or older) or infirm occupant for whom presence of children would be a hardship

- b) Owner/occupant temporary lease
- c) Lease of owner-occupied two-family

B. Enforcement Remedies

- i. MCAD
- ii. Civil Action
 - 1) Injunctive relief, damages, affirmative relief, civil penalties, attorneys' fees for prevailing complainants
 - 2) Broker/salesman licensing enforcement

C. MCAD Procedures

- i. Complaint/Answer
- ii. Public Information
 - 1) Documents available for inspection by all parties and the public
 - 2) Documents not available to parties and the public
- iii. Investigation by the Commission
 - 1) Investigatory process
 - 2) Fact-finding conference
 - 3) Discovery or exchange of information
 - 4) Probable Cause/Lack of Probable Cause
 - 5) Conciliation
 - 6) Election of State Court Proceeding
 - 7) Role of the Attorney General
 - 8) Public Hearing
 - 9) Appeal to full Commission
 - 10) Judicial Review

III. Practical Applications and Trends

A. Examples of cases

- i. **Shapiro v. Cadman Towers**, 844 F. Supp. II 6 (E.D.N.Y. 1994)
- ii. **Devita v. Ferlisi**, 15 MPLR 1444 (1993)

B. Handling Problem Situations

- i. Broker's liability for actions of salesmen
- ii. Agent's liability if working in office, with discriminatory listings
- iii. Handling racial violence/intimidation
- iv. Responding to information that client may have discriminatory preferences

- v. Lead paint law and discriminatory practices against families with children (duty to disclose all available units) G.L. c. III, ss. 189-199B

FAIR HOUSING RESOURCES AND PUBLICATIONS

Non Discriminatory--Real Estate Practices: The Responsibilities of Real Estate Brokers and Property Owners Under The-Fair Housing Laws.

Massachusetts Association of Realtors' - Fair Housing Chart

Court decisions: **Devita v. Ferlisi** and **Shapiro v. Cadman Towers**

Fair Housing Rights of Individuals With Disabilities Physical Access - Chart

RE20R01 LEAD PAINT – Residential Sales and Rentals

I Summary –Why Lead is an issue

- A. General History of Use of Lead in Building Product; plaster, paint, pipes, etc.
- B. What is lead poisoning and who is at risk?
- C. How does someone get lead poisoned, what are the symptoms and how it is detected?
- D. What are the effects of lead poisoning and what are the treatments

II “The Lead Law” as a combination of both federal and state law

- A. Federal and State Law Requirements
 - 1) Disclosure. Applies to properties constructed prior to 1978.
Form Notice Disclosure: State Form Satisfies Federal and State Disclosure Requirements.
 - a) Sales or Leases with Option to Purchase
 - b) Rentals
 - c) Vacation Rentals
 - 2) Timing:
 - a) Prior to the time the Parties are bound in contract
The federal law explicitly states, that to comply with federal lead disclosure, that “before the purchaser or lessee is obligated under contract to purchase or lease” the lead notification must be given. U.S. Code Sec. 4852d(a).
 - 3) The Right to Inspect for the Presence of Lead based hazards.
 - (a) Sales or Lease with Option to Buy.
 - (i) Statutory Right: ten day opportunity to inspect for the presence of lead base hazards
 - (b) Rentals
 - (i) Tenants have a right to ask to have the property inspected
 - (ii) If the property has lead and a prospective tenant has a child under six, the landlord may delay the tenancy for up to 30 days.
 - (iii) New owners must bring property into compliance within ninety (90) days of purchase
 - 4) Lead Paint and Unlawful Discrimination
 - (a) Residential Sales:

A seller may not discriminate under the Lead Law

- (i) because a prospective buyer has children under the age of six
- (ii) has asked about lead
- (iii) has included a lead inspection contingency with an offer to purchase

(b) Residential Rentals:

A Landlord may not:

- (i) refuse to rent to because of the presence of lead
- (ii) charge a tenant for the cost of the deleading
- (iii) enter into a contract limiting a landlord's obligation to delead or liability under the statute

The Landlord must

- (i) delead or bring make lead-safe property where a child under six resides
- (ii) subject to the right to delay a new tenancy for up to thirty days, the landlord is responsible for finding alternate housing during the period of deleading

A Landlord may be held strictly liable for lead poisoning of a child, regardless of actual knowledge of the presence of lead paint. If the apartment is subject to a Letter of Compliance or Letter of Interim Control by a licensed lead inspector, the Landlord may not be held liable, rather a plaintiff must prove they acted negligently in order that the Landlord be held liable.

A Landlord sued by the parents acting on behalf of a child who suffered lead paint poisoning may not file a cross-complaint or counter-suit against the parents for negligence. Rather, the Landlord must defend the suit, and if found liable, sue the parents in a separate action within one year of the entry of judgment against the Landlord.

5) Duty to Delead, Abatement and Interim Control

Massachusetts law compels the abatement of lead-based materials in dwelling units where a child under six resides. The law is designed to protect children under six years of age that permanently reside in a dwelling that contains lead.

III. Penalties for Non-Compliance with Lead Law for Sellers, Landlord and Real Estate Agents

- Federal and State law allow civil and criminal penalties for failure to give lead notification, Penalties for violations
 - **(1) Monetary penalty**
Civil Penalties under state law up to \$1,000 and under federal law up to \$10,000 per offense..
 - **(2) Action by Government**
Offenders may face injunctions ordering them to cease in violations
 - **(3) Civil liability and Costs**
Any person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual under federal law. Also under federal law, a court may award court costs to the party commencing such action, together with reasonable attorney fees and any expert witness fees, if that party prevails. Under state law, real estate agents, property managers and certain landlords and sellers, where applicable, may be subject to civil liability under the Consumer Protection Statute, M.G.L. c. 93A, which allows award of up to two or three times actual damages and attorneys fees.
 - **(4) Other Prohibited acts/Fines**
It shall be a prohibited act under section 409 of the Toxic Substances Control Act (15 U.S.C. 2689) for any person to fail or refuse to comply with a provision of this section or with any rule or order issued under this section. For purposes of enforcing this section under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the penalty for each violation applicable under section 16 of that Act (15 U.S.C. 2615) shall not be more than \$10,000.
- Federal 42 U.S.C. Sec. 4851-4856
- Commonwealth of Massachusetts .G.L, c. 111 Sections 189A-199B
05 C.M.R. Sections 460 et seq.

“The Lead Law” is both federal and state law, with state law requiring affirmative duties on the part of owners to de-lead or make their properties “lead safe” rather than simple notification.

IV Mechanics of Compliance For Brokers and Salespersons

Notifications/CLPPP Forms. If properly filled out and given, comply with both federal and state law

Transfer Notification Certification (Residential Sales or Lease with Option to Purchase)

Tenant Notification Certification (Residential tenancies)
Short-Term Vacation or Recreational Rental Exemption Notification
(Vacation Rental)

- 1) Filled out by the Seller or Landlord
- 2) Tenant or Prospective Buyer Acknowledges Receipt of FILLED OUT Notification, which includes reports
- 3) Broker acknowledges compliance with duties to inform owner and prospective buyers and tenants
- 4) Record Maintenance
- 5) Fines and Civil Penalties

Lead Paint Inspection

- a) The Right to Inspect
- b) Duty to Delead
- c) Contingencies in Offers to Purchase or Purchase and Sale Agreements

Short-term Vacation or Recreational Rental Exemption Notification

(Dwelling units rented or occupied for vacation or recreational purpose for a period of 31 days or less)

V. Abatement and Certificates of Compliance

A. Three Categories of Risk and Who May do the Work

Break down work that must be done by licensed and what work may be done by unlicensed persons and training requirements. Explain process for being approved to do certain work

1. Low Risk Abatement
2. Moderate Risk Abatement
 - a. What it is
 - b. Who may do it/Certification Requirements
3. High Risk Requiring Licensed Persons
 - a. Inspectors are Licensed by Dept. of Public Health
 - b. DeLeaders are Licensed by the Dept. of Labor

B. Disclosure During Renovations

Pre-Renovation Lead Information Rules

- 1) Application-
 - a) Property constructed prior to 1978 and renovation project will disturb more than 2 square feet of paint.
 - b) Renovations done by a person for compensation
- 2) Notice Requirements to Owner and Tenants
- 3) Pamphlet: Protect Your Family From Lead in Your Home

VI. Funding Abatement

Tax Credits
Funding Options

VII Liability Issues Review

Failure to Give Disclosures
Strict Liability for Lead Poisoning
Effect of Certificates of Compliance and Negligence Standard

Laws and Resources for Instructors and Students

Federal	42 U.S.C. Sec. 4851-4856 (Specifically Discuss Section 4852d)
Commonwealth of Massachusetts	M.G.L. c. 111 Sections 189A-199B 105 C.M.R. Sections 460 et seq.

Case Law.

Instructors may wish to discuss broker liability in relation to recent case law:
Piers v. Wheeler & Taylor, Inc. No. 960088 (Jan. 26, 1998) Superior Court, Berkshire SS

Suggested Handouts:

Transfer Notification Certification (Residential Sales or Lease with Option to Purchase)
Tenant Notification Certification (Residential tenancies)
Short-term Vacation or Recreational Rental Exemption Notification
(Dwelling units rented or occupied for vacation or recreational purpose for a period of 31 days or less)
(Regulations governing Short-Term Vacation Rentals are found at 105 CMR 460.100(D). See also CLPPP Publication Protocol for Maintaining Intact Paint in Vacation Rental Property)

Links for Additional Information and Material:

<http://www.state.ma.us/dph/clPPP/>

Other Sources

- The Real Estate Desk Book, A Broker's Guide to Consumer Protection, Procuring Cause and Commissions, Philip S. Lapatin, Esq., Greater Boston Real Estate Board, 1999
- Landlord Rights and Responsibilities Massachusetts Association of REALTORS® and Massachusetts Office of Consumer Affairs and Business Regulations

- Tenant Rights and Responsibilities Massachusetts Association of REALTORS® and Massachusetts Office of Consumer Affairs and Business Regulations

Instructor Notes:

Instructors are responsible for maintaining their own curriculum to keep abreast of changes in the law. The list of authority and secondary is not exhaustive, and Instructors must rely on independent research. Instructors are responsible for seeking copyright permission prior to using any copyrighted materials.

RE21RC01 ADA

I. Fair Housing Rights of Individuals with Disabilities

A. Two essential concepts

i. Definitions:

- 1) 3-part definition of "Individual with a disability"
- 2) "qualified individual With a disability"

ii. Reasonable Accommodation

B. State Law - Chapter 151 B

i. Who is protected?

ii. Who is covered?

iii. What property is covered?

iv. Substantive Provisions of Chapter 151 B

- 1) unlawful to deny, withhold accommodations because of disability, or to discriminate in terms, conditions or privileges based upon disability, s. 4, para. 6;
- 2) refusal to permit accommodations at person's expense, or at own expense if sufficiently large entity, s. 4, para. 7A(1);
- 3) refusal to make accommodations in rules, policies, practices or services, s. 4, para. 7A(2);
- 4) failure to include "basic access" in multi-family dwellings built after March, 1991; five percent wheelchair accessible and two percent communication accessible, 804 C.M.R. s. 2.03 (5).

v. Enforcement

- 1) administratively through the MCAD, and/or
- 2) civil action in Superior Court
- 3) Scope of Relief before the MCAD
- 4) **Devita v. Ferlisi** decision

C. Federal Law - Title VIII, 42 U.S.C., s. 3604

i. Who is protected?

ii. Substantive provisions

- 1) unlawful for person or entity engaged in residential real estate transactions to discriminate on the basis of "handicap", 42 U.S.C., s. 3605 (a);
- 2) unlawful to not permit reasonable accommodation at person's expense, 24 C.F.R, s. 100.20');
- 3) unlawful to fail to make reasonable accommodations in rules, policies. or services, 24 C.F.R. 100.204 (a);

- 4) multi-family dwellings designed for first occupancy after March, 1991, must be designed and constructed in manner that enhances accessibility for IWDs, 24 C. F.R., s. 100.205;

iii. Enforcement

1. Administrative complaint with HUD
2. Civil Suit. United States District Court

iv. Relief

- v. *Shapiro v. Cadman Towers, Inc.*, 844 F.Supp. 116 (E.D. N.Y. 1994)

D. Scope of Permissible Inquiries as to the Existence or Nature of a Disability

II. Title III of the Americans with Disabilities Act (ADA), 42 U.S.C., s. 12181.

A. Coverage of "Public accommodations." and "Commercial Facilities"

B. Substantive Provisions

- i. General non-discrimination requirements, 28 C.F.R., s. 36.201 (2)
- ii. Physical Access, 28 C.F.R., ss. 36.304 and 36.401
 - 1) "new construction" -- ADAAG; compare and contrast: Access requirements under A-AB statute (see chart)
 - 2) "existing facilities"
 - 3) liability/obligations: landlord-tenant
- iii. Communication Access. 28 C.F.R., s. 36.303
- iv. Enforcement
- v. Relief

III. Practical Applications and Trends

A. Examples of cases

- i. **Shapiro v. Cadman Towers**, 844 F. Supp. II 6 (E.D.N.Y. 1994)
- ii. **Devita v. Ferlisi**, 15 MPLR 1444 (1993)

B. Handling Problem Situations

- i. Broker's liability for actions of salesmen
- ii. Agent's liability if working in office, with discriminatory listings
- iii. Handling racial violence/intimidation
- iv. Responding to information that client may have discriminatory preferences
- v. Lead paint law and discriminatory practices against families with children (duty to disclose all available units) G.L. c. III, ss. 189-199B

ADA RESOURCES AND PUBLICATIONS

Non Discriminatory--Real Estate Practices: The Responsibilities of Real Estate Brokers and Property Owners Under The-Fair Housing Laws.

Massachusetts Association of Realtors' - Fair Housing Chart

Court decisions: **Devita v. Ferlisi** and **Shapiro v. Cadman Towers**

Fair Housing Rights of Individuals With Disabilities Physical Access - Chart

RE22RC01 TITLE V

I. MASS. TITLE V REGULATIONS: 310 CMR 15.00

1. Septic Systems: Impact on Water Quality
2. Massachusetts Commercial Lease Clause Impact
3. More Complex with commercial properties due to septic system sizes

II. Massachusetts: 310 CMR 15.00 Effective March 31, 1995

1. All on-site disposal systems must be inspected at or within 9 months prior to title transfer.
2. Exemption on refinancing or change of ownership among same partnership or spouse.
3. Grace period of 6 months after transfer for inspection if weather conditions prevent inspection as stipulated by Code 310 CMR 15.301
4. Lenders still might require “holdback” if inspection is delayed.
5. DEP interpretations of “weather conditions”
6. Local Massachusetts Boards of Health standards may exceed state requirements.
7. Massachusetts Buyers and Sellers may negotiate who will pay and who will perform the inspection.
8. Inspections to be Conducted by Qualified and Certified Title V Massachusetts professionals
9. Massachusetts Tax Credit: January 1, 1997
 - * Goes to Homeowners
 - * Cap of \$1,500 per year and maximum overall credit of \$6,000 for a four year period.
10. Reporting Responsibilities .
11. “Conditional” Title V certificate.
12. Massachusetts towns may elect to connect to town sewer on failures.
13. Alternative Technologies –
14. Setbacks – River/Well/Stream
15. Expansion of Structure or change of use.

III. Large Commercial Systems

1. Systems with design flow of 10,000 gals/day or greater but less than 15,000 gpd/day
 - * To be inspected frequently
 - * May require issuance of groundwater discharge permit
 - * May require the installation of technology capable of discharging effluent which meets Class I groundwater standard.

- * Most impact on commercial/industrial properties
- 2. No person shall discharge from the industry categories to any regulated systems.
- 3. No system shall receive oil, hazardous materials or waste, medical wastes or radioactive waste.

IV. New Systems in Massachusetts

- 1. Any change in use or expansion that requires building permit/occupancy permit triggers Title V.
- 2. No new system shall be constructed and no system shall be upgraded or expanded if it is feasible to connect the facility to a sanitary sewer.

- * Exceptions to the rule
- * Remedial use of an alternative system .
- * Variances and special approvals
- * Grand-fathering on industrial category users.

- 3. Minimal septic tank size to be 1,500 gals.

**** Remember Commercial Septic Systems Are Usually Much Larger and More Complex than Residential.***

Critical to the up-keep of Septic System

- Have tank pumped 1-2 times per year.
- Keep record of pumping inspections and other maintenance
- Learn location of septic systems and drain field
- Keep commercial building sump pumps away from septic system.
- Do not dispose of hazardous chemicals
- Impact on commercial leasing abilities for future tenants.
- Practice Water Conservation
- Know the location of flow diversion valve and turn once a year: adds life
- Divert roof drains and surface water from septic system
- Do not park or drive over system
- Do not grow landscaping in area of septic systems

- Do not use commercial septic tank additives
- Keep grease, plastics, gasoline, oil, paint, paint thinner, pesticides, antifreeze, etc. out of system

CONCLUSION

Suggested Handouts: Title Question and Answer Document, 1/96
Subsurface Sewage Disposal System Inspection Form 4/25/97

Reference Material: MGL 131 Chapter 40
310 CMR 10.00

Title V Hotline available through Massachusetts Department of Public Health

RE23RC01 THE WETLANDS PROTECTION ACT

1. Why Massachusetts has the Wetlands Act

- a. Congress enacted the first comprehensive regulatory program in 1970 – the Clean Air Act which set the modern pattern
 - 1) The federal government establishing standards designed to protect the public health
 - 2) The states are delegated implementation and enforcement authority with the EPA maintaining oversight
- b. The Clean Water Act
- c. The Safe Drinking Water Act
- d. Matrix of primary Massachusetts environmental statutes and regulation

2. What is the Wetlands Protection Act?

- a. Massachusetts General Law chapter 131 section 40
- b. Administrative regulations
- c. Local town bylaws
- d. Federal statutes

3. Areas subject to protection under the Wetlands Protection Act

- a. Water bodies
- b. Land under water bodies
- c. Land areas bordering on water bodies
- d. Land subject to tidal action or coastal storm flowage
- e. Land subject to flooding
- f. Buffer zones

4. Wetlands soils and wetlands plants

- a. Wetlands soils
- b. Wetlands plants
- c. Both must be present for the Wetlands Protection Act to apply

5. Interests of the Wetlands Protection Act

- a. Protection of public and private water supply
- b. Protection of ground water supply
- c. Flood control
- d. Prevention of storm water damage
- e. Prevention of Pollution
- f. Protection of land containing shellfish

- g. Protection of fisheries
- h. Protection of wildlife

6. How the Wetlands Protection Act is implemented

- a. Local conservation commission appointed by Board of Selectmen
- b. Conservation commissioners and local town bylaws enforce the Act
- c. Local town bylaws may be more strict than the Act
- d. No person shall remove, fill, damage or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach dune, flat, marsh, meadow or swamp bordering on the ocean or any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially change or enlarging, an existing and lawfully located structure used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other communication services without filing written notice of his intention...
- e. No person shall take action which would result in:
 - Changing drainage characteristics
 - Changing flushing characteristics
 - Changing salinity distribution
 - Changing sedimentation patterns
 - Changing flow patterns
 - Changing flood detention areas
 - Lowering the water level
 - Lowering the water table
 - Destroying vegetation
 - Changing water temperature
 - Changing biochemical oxygen demand
 - Changing physical, chemical or biological characteristics of the receiving water

Without the prior approval of

- Local permitting authority
 - Perhaps the state DEP
 - Perhaps the US Army Corps of Engineers
- f. Request for determination of applicability
- g. Notice of Intent

7. Filing procedures

- a. Request for determination of applicability
 - Notice
 - Public hearing
 - Site walk
 - Positive determination or negative determination
 - Notice of intent or appeal to DEP
 - Superseding determination
- b. Four primary uses of request for determination of applicability
 - Confirm wetlands boundaries
 - Determine is area is subject to jurisdiction
 - Determine if proposed work is within are subject to jurisdiction
 - Determine if work proposed within an area subject to jurisdiction will cause impacts to wetlands
- c. Review sample request for determination
- d. Notice of intent
 - Abbreviated notice of intent and notice of applicability
 - Notice
 - Public hearing
 - Site walk
 - Determination of significance
 - Notification of non-significance or determination of performance standards
 - Order of conditions
 - Appeal to DEP
 - Site inspection
 - Superseding order of conditions
- e. Review of sample notice of intent
- f. Review of sample order of conditions
- g. Related permits
 - Local bylaws
 - Chapter 91
 - Clean Waters Act

Suggested handouts:

The Wetlands Protection Act, MGL Chapter 131, section 40

A sample Request for Determination of Applicability

A sample Notice of Intent

A sample Order of Conditions

RE24C01 21E: BROWNFIELD

I. THE SPECIFIC SITE Environmental Issues: In-Ground Contamination

A. HAZARDOUS WASTE: Massachusetts G.L.C. 21E

1. History of 21E back to April 1, 1983.
2. The Dangers of Hazardous Waste: Definition and Examples
3. Reportable vs. Minimum thresholds in Massachusetts
4. Illegal Disposal of Materials
5. Difference between “Superlien” and the “Superfund” Act
6. Definition of the Massachusetts Regulation
7. Impact to Massachusetts Owner, Lender and Title Insurance
8. Secured Creditors Insurance vs. Environmental Warranty Insurance: Massachusetts Impact
9. Massachusetts Resources available on an area’s environmental condition
10. The Environmental Assessment in Massachusetts:
 - Site Inspection
 - Site History
 - Subsurface Investigation
11. Clean-Up Mitigation Measures
12. Who Pays for the Report in Massachusetts?
13. When must it be completed and the impact on sales negotiations?
14. Definition of an AUL and its impact on Massachusetts commercial real estate.
15. Massachusetts Broker’s Liability
16. 1993 Mass Contingency Plan & Licensed Site Professionals (LSP)

17. Brownfields: **Federal Legislative credit, September 1996**

- Development Opportunities with economic state incentives to spur redevelopment
- * Will return underutilized land to the municipal tax roll
- * Land will be used for development and employ people in new workplace.
- * Use of private vs. public capital
- * Private capital to mitigate or clean environmentally damaged properties
- * Proposals for low-interest loans to developers; loan guarantees and environmental insurance and a tax credit for “innocent” developers who clean-up sites
- * Proposed Federal tax breaks including the cost of assessing contamination
- * Many developers know that the cost of assessing could be prohibitive before actually deciding to purchase land and clean problem
- * **Massachusetts LLL law.** August, 1998 and the brownfield pool for towns.

RE25RC01 FINANCING

I. LOAN ORIGINATION: Massachusetts General Process

Loan application packaging to the Massachusetts lender has three major steps.

1. Primary application.
 - a. Survey of Potential Massachusetts lenders and prevailing rates
 - b. Apply to more than one lender
 - c. Interim Submission
 - d. Final Submission
2. Contents of Final Massachusetts Loan Application
 - a. Concept of Project: Overview
 - b. Market Studies to indicate demand
 - c. Feasibility Study
 - d. Site Location
 - e. Site Studies
 - f. Plan For Building
 - g. Cost of Project
 - h. Management Plan for the Project.
 - i. Sponsorship Information
 - j. Details on Loan Requested
3. Negotiation of Contract in Massachusetts
 - a. Term of the Mortgage
 - b. Method of Payment
 - c. Default Procedure and Conditions Constituting Default.
 - d. Insurance Required
 - e. Tax and Insurance Escrows Required in Massachusetts
 - f. How Massachusetts interprets the lease
 - g. Assignment of Rents
 - h. Exculpatory Provisions

- i. Assumption and Assignment
- j. Permission for Sale or Transfer to a Controlled Entity
- k. Permission for Junior Liens
- l. Permission for Partial conversion or sale at a Later Date
- m. Condemnation
- n. Title Insurance
- o. Contingencies based on inspections by municipal authorities
- p. Municipal Lien Certificates in Massachusetts
- q. Utility Transfers
- r. Real Estate Tax transfer: Massachusetts Stamps
- s. Lawyers to be employed to effect closing
- t. Assignment of commitment prior to closing
- u. Periodic financial statements required
- v. Final Settlement Date

II. TYPES OR SOURCES OF LOANS/MORTGAGES in MASSACHUSETTS

- | | |
|---|---------------------------------------|
| 1. Commercial Banks | 9. Owner Financing |
| 2. Savings and Loan Associations | 10. Equity Financing |
| 3. Life Insurance Companies | 11. Joint Partners |
| 4. Pension Funds | 12. Public companies:
Stockholders |
| 5. Mortgage Banker | 13. Wealthy Individuals |
| 6. Mortgage Broker | 14. College Alumni Funds |
| 7. REITs | 15. Trusts |
| 8. Massachusetts State or
Massachusetts Community
Financing | 16. Syndication |

RE26RC01 APPRAISAL PROCESS

I. LEARNING TERMINOLOGY

Definition: An appraisal is an unbiased estimate of the nature, quality, value or utility of an interest in, or aspect of, identified real estate.

* Appraisal is a valuation and an evaluation.

* **Definition:** Valuation is the process of estimating market value, investment value, insurable value, or other property defined value of an identified interest in a specific parcel at a given date.

* **Definition:** Evaluation is a study of the nature, quality, or utility of a parcel of real estate without reference to a value estimate

* **Definition:** Counseling may be a mixture of the two and most importantly, submitting recommendations to solve the problem.

II. APPRAISAL INSTITUTE'S DEFINITION OF APPRAISAL PROCESS and HOW ITS USED IN MASSACHUSETTS

1. Concepts of Land
 - a. Geographic
 - b. Legal
 - c. Social
 - d. Economic
2. Appraisal
 - a. Discipline of Appraisal
 - b. Real Estate, Real Property and Personal Property
 - c. Definition of Appraisal
3. Importance of The Appraisal to a Massachusetts Community
4. Valuation Process
 - a. Definition of the Problem
 - b. Preliminary Analysis and Data Selection and Collection
 - General

- Specific
- c. Highest and Best Use Analysis
- d. Land Value Estimate
- e. Application of the 3 Approaches
 - Sales
 - Income
 - Cost
- f. Reconciliation of Value Indications and Final Value Cost
- g. Report of Defined Value

III. REPORT WRITING in GENERAL

- * Function of a report is to lead a reader from the definition of an appraisal problem to a specific conclusion through reasoning and relevant descriptive data.
- * Appraiser's facts, reasoning, and conclusions must be presented clearly and succinctly.
- * Length of report is not as relevant
- * Can be oral or written but usually decided by client
- * If oral, still must have detailed documentation.
- * Must be meaningful to a client and not misleading in the market.

IV. INDUSTRY STANDARDS FOR REPORTING

- * The Appraisal Institute (nationally) sets minimum requirements for contents, facts, descriptions and statements of work and purpose in all types of appraisal reports.
- * In Massachusetts and elsewhere the report should include the following:
 - * Complete description of the appraised real estate.
 - * Explanation of assumptions, limitations and disclaimers.
 - * All significant facts used.
 - * Reasonable complete summary
 - * Date of valuation and report
 - * Statement of the Interest Appraised.
 - * Clear Statement of any smaller parcels of larger parcels.

- * That the appraiser has no interest or personal bias to the parties involved.
- * Certified statement that the appraiser did or did not inspect the property and the facts reported are true.
- * Statement of report distribution and intended use.

V. THE APPRAISAL PROCESS EXPERIENCED IN MASSACHUSETTS

* **Definition:** Opinion of Value at that point in time between two able and willing parties that want to sell and buy

- * Fair Market Value
- * Appraisal includes 3 Approaches: Market, Income and Cost Approach.
- * Law of Supply & Demand is the basis for the 3 appraisal approaches

The Law of Supply and Demand

- * Assumes that the market is “perfect”
- * Assumes perfect knowledge of the product
- * Assumes An Active market with no monopolies of buyers/sellers or large enough to affect prices
- * Assumes homogeneous product: that all comparables are the same
- * Assumes all cash transactions, no financing
- * Assumes Easy Entry into the Market by All Interested Buyers

VI. MARKET APPROACH

* **Definition:** Price that equates the supply of real estate to the demand for real estate

- * In Massachusetts, how does an appraiser find market information?
- * Sales Comparables: Massachusetts Town Hall recent reports
- * Massachusetts Brokers: For lease and sales information
- * Trade journals and market reports

VII. INCOME APPROACH

* **Definition:** Price that equates the supply of income streams to the demand for income streams

* This approach works better for investment property rather than owner-occupied

- * Calculate net income
- * Impose any variations in operating expenses with vacancy rate and reserves
- * Impose a Capitalization Rate; **Massachusetts Examples**
- * Determines potential value to investor
- * Massachusetts Information from sales comparables, talking to investors, researching alternative investments, talking to investment brokers, etc.

VIII. COST APPROACH

***Definition:** Price that equates the supply of material and labor to the demand for material and labor

- * Strictly “bricks and mortar” approach
- * Cost to rebuild the same structure on the same site
- * Estimates from brokers, construction firms, architects, trade journals ie. Dodge Report

IX. SAMPLE OF COMPLETED MASSACHUSETTS APPRAISAL

X. SAMPLE OF MASSACHUSETTS COMMERCIAL BROKER’S OPINION OF VALUE

RE27C01 1031 EXCHANGES

1. Definition:

- * Tax Deferred Exchange 1031 IRS Code: Goes back to the 1920s.
- * Applies to Business Use and Investment Properties
- * Includes Rental, Land and Commercial Real Estate
- * Provides Safe and Legal Procedure for rolling sales profits into new property as a nontaxable event.
- * It is not a “swap”

2. History of 1031 IRS Code Exchanges: its Impact in Massachusetts is from the Federal Rules

3. Reasons Why Massachusetts Real Estate Investors Exchange

- Tax Advantages
- Disadvantages

4. Time to Execute an Exchange

5. List of Types of Massachusetts Real Estate that Can Qualify

6. Absolute Statutory Requirements to do a 1031 Exchange: 6 major concerns.

7. Massachusetts Properties that Do Not Qualify for Exchange

8. Identification Rules For an Exchange

- Option 1: The 3 Property Rule
- Option 2: The 200 Percent Rule
- Option 3: The 95 Percent Rule
- Option 4 The 45 Day Rule
- “Like Kind” Exchanges

9. Rules on Multiple Exchanges

10. Definition of “Reverse Exchanges”

11. “Delayed” Exchanges

12. Definition of “Boot”

13. Selecting an “Intermediary”

14. Exchange Fees

15. Massachusetts Professional Services that Assist in 1031 Exchanges

- Licensing Issues?
- Cost and Fees?
- Web Sites?
- Geographical Constraints?
- Lenders for 1031Exchanges?

RE28RC01 FORECLOSURES/ESTATE SALES/AUCTIONS

FORECLOSURE PROCESS IN MASSACHUSETTS

*** Massachusetts Consumer Protection Issues**

- A. Late Mortgage Payment
- B. No Mortgage Payment
- C. Notices to Borrower
- D. Workout Department
- E. Appraisal
- F. Broker Opinion of Value
- G. Smart Lenders Perform Due Diligence
- H. Notice of Auction: Boston Globe, Herald, etc.
- I. Federal Soldiers and Sailors Act
- J. Auction/Massachusetts Licensing for Auctioneers
- K. Taking Title in Massachusetts

RE29C01 INVESTMENT PROPERTY

I. VALUATION

GOOD LEASE PROTECTS THE VALUE OF A PROPERTY

- * Quantity and Quality of the Cash Flow Stream is What an Investor Will Buy or a Financial Institution Will Lend
- * The appraisal is on the reliable and quantity of the cash flow.

II. MEASURING INVESTMENT PERFORMANCE

Understanding and Calculating the Concepts of Value

A. Capitalization Rates

- * Capitalization rate is an investor's subjective overall rate of return demanded from one specific property.
- * Examples for Massachusetts Properties

B. Definition and Formula of Band of Investment Approach (use BOI formula)

- * Investors impose a capitalization rate to value investment property
 - History of BOI
 - Relevancy in a Deflationary Economy
 - Industry Arguments For and Against Its Importance
 - Using BOI for valuation and negotiating tool
 - Income Stream vs. "Bricks and Mortar" Purchase
 - Return on Equity
 - Subjective Rates of Returns
 - It's use by Institutional Investors
 - Other Factors in Determining Value in addition to BOI
 - Debt vs. Equity Financing

BAND OF INVESTMENT APPROACH **INCOME/VALUE RATIO**

FORMULA:

1.

% of Mortgage to Value of Property
(Loan to value ratio)

X

Loan Constant for Mortgage
(Mortgage rate)

=

% Rate of Return to the Loan Portion
of the Investment

+

% of Equity Raised

X

% Cash on Cash Return Desired By
the Investor (Interest)

=

% Return on Equity

OVERALL RATE OF RETURN

=

% Amount (CAP)

2.

Net operating income

% Overall Rate of Return (CAP)

=

Total value of property

Example:

Assume you borrow 75% of the value of a property at 10.5% for 25 years

Your investor requires an 12% return on his equity invested.

If the net operating income of the property is \$ 180,000 then what could the investor pay for this property?

Mortgage Constant Formula:

Annual Debt Service = Mortgage Constant
Total Loan Amount

C. APOD Sheet

*** NOI/Cap Rate = Value**

D. ESCALATORS

*** *Impact to Value***

1. Why do we have escalators?
2. Consumer Price Index (CPI)
 - * Two U.S. indices
 - * Regional indices (Boston vs. Northeast)
3. Negotiated “Bumps” or Rent Increases

E. VALUATION PROCESS

1. Sources and Investigation of Market Transactions/Valuations in Massachusetts

- Locating Sales Data
- Public Records
- Published News
- Massachusetts MLS
- Listings Offers
- Filing Sales Data
- Commercial Listing Services in Massachusetts

2. Investigating Additional Market Data

- Improvement Cost Data
- Income & Expense Data
- Capitalization Rates

3. The Three (3) Valuation Approaches

- a. Sales
- b. Income
- c. Cost

III. ELEMENTS AND ECONOMIC VARIABLES TO VALUE

- A. **Definition of Value:** Interaction of supply and demand affects value. A function of the purpose for which an estimate of demand is sought.

* The value of real property reflects and is affected by the interplay of basic forces that motivate human activities.

- B. **Economic Variables To Be Familiar With:**

1. Supply and Demand

* If the quantity of a product is high, price will be low

2. Highest and Best Use

3. Economic Variables include Primarily Demand-Side Economic Characteristics:

1. Stock of available vacant and improved properties.
2. New Development.
3. Occupancy Rates.
4. Rent and Price patterns of existing properties.
5. Construction Costs.

- C. **Elements and Economics Variables Include:**

1. Market Value

- * Probable price in the open market
- * Uses of the Property
- * Asking price
- * Offering Price
- * Collateral for Loan
- * Compensation for Condemnation

2. Assessed Value

3. Reproduction Cost

4. Value in Use

5. Investment Value

6. Value as a Function of Property Rights
7. Value in Amenity Properties Compensation to Value in Investment Properties
8. Value in Investment Properties
9. Functional Obsolescence vs. Economic Obsolescence:
- 10. All Types of Value Are Based on Anticipated Future Benefits***

D. CASE STUDY: MASSACHUSETTS COMMERCIAL PROPERTY VALUATION

RE31C01 COMMERCIAL LEASING

I. LEASING

A. A good Lease Protects the Value of a Property

1. Quantity and Quality of the Cash Flow Stream is What an Investor Will Buy or a Financial Institution Will Lend

II. GENERAL INDUSTRY LEASE:

A. General Rules:

1. Tenant is obligated to pay for space and services.
2. Landlords provide space, utility services and a quiet working environment.
3. Value of real estate has little to do with the real estate as “brick and mortar”.
4. A good lease protects the value of a property.
5. Good communication is the key - Be sure that all parties understand (Tenant, Landlord, and Broker) before signing a lease.
 - a. Tenant, Landlord and Broker
 - b. Who gets What?
 - c. Who pays for What?

B. Letter of Intent

1. Historically Non-binding in Massachusetts.
2. Massachusetts Court Case: McCarthy vs. Tobin
3. Disclaimer Language
4. Reviews the business terms of a lease agreement
5. How is a LOI developed?

III. MEASURING SPACE

There is no universal industry agreement between all real estate professionals on the definitions. This lack of continuity adds confusion.

A. Three Categories of Space in the Industry

1. Define
 2. Gross or Buildable (Industrial or strip retail, free-standing leases)
 3. Rentable (Usable plus Common Area): (office, industrial, enclosed retail).
 4. Usable: Actual Tenant Space. (Office).
2. Methods for Measuring Space
 - A. BOMA Standards of Measuring Space: Standards are updated on a continuous bases
 - B. New York Standard
 - C. It can be market driven.
3. “Common Area”
 - A. Common Area is the space available to all tenants.
 - B. Common area includes bathrooms, hallways, utility closets, janitorial closets, lobby areas, etc.
 - C. Does not include vertical space such as elevator shafts, stairwells, atriums, etc.
 - D. Market driven: What are the prevalent methods?
 - E. Discuss CAF, RSF, USF and calculations.
 - * Loss Factor vs. Common Area Factor (CAF)

IV. **NEGOTIATION**

- The Rules for Massachusetts Commercial Brokers have changed in 2000
- Impact to Commercial Brokers
- Massachusetts G.L.C. 93A and It’s New Massachusetts Impact
- Deceptive Commercial Lease Negotiating Tactics
- Chapter 93A: Triple Damage consequences.
- Mass Appeals Court Case: Greenstein vs. Flatley
- Mass Court Case: 18 Tremont Street (Boston)

- Mass Court Case: Anthony's Pier 4 vs. HBC Associates

V. IMPORTANT LEASE CLAUSES

A. FOR OFFICE/INDUSTRIAL LEASING (explain in detail) Massachusetts More Recent Critical Negotiating Terms

- * Default
- * Recapture
- * Restoration
- * Self-Help/ Off-Set Provisions
- * Sub-lease/Assignment
- * Buy-Out

B. FOR RETAIL (explain in detail)

- * "Going-Black" clause
- * Exclusivity of Use
- * Landlord Contribution
- * Tenant Reimbursables
- * Percentage Rent
- * Pad Sites

RE32C01 COMMERCIAL LEASES

I. GROUND LEASE

- A. Define Ground Lease and when it would be used
- B. Subordination is key
- C. Financing Capability
- D. Lessor Avoids Capital Gains
- E. Calculating a ground lease rental rate.
- F. Are Ground Leases Popular?

* Why or Why Not?

II. SYNTHETIC LEASE

* IRS Code is the focus and higher value to the parties involved

A. Concept Summary

- 1. Third party acquires/develops building and leases it to lessee
- 2. Lessee pays Lessor minimum rentals during the term: usually all net lease
- 3. Lessee has option to purchase asset at pre-determined fixed price and provide first loss guarantee to lessor.
- 4. Present value of first loss guarantee plus rent is less than 90% of asset purchase price.
- 5. New lease concept to real estate but its been used with boat sales, plane sales, etc.
- 6. Requires a unique situation; usually on build-to-suits with public companies that have weak balance sheets.
- 7. Tenant negotiates long-term lease of approximately 20 years or more with the negotiated purchase price.
- 8. Tenant can use the depreciation as well as rental expenses.

9. Landlord gets a return on equity.
10. At the end of the lease term, tenant pays for building but the accrued rent must equal 90% of purchase price and is applied to purchase price.
11. Tenant keeps the lease off its balance sheet as a liability. Phantom expense.
12. A capital source provides the funding for the construction for the construction or acquisition of real estate to be utilized by and leased to corporate user.
13. The capital source directly acquires the real estate from the developer and leases the real estate to the corporate user.

B. Accounting Guidelines

Synthetic real estate transactions are structured to qualify as operating leases under SFAS 13.

In order to achieve “off balance sheet” financing, the four criteria outlined below must *not* be met.

Can not meet the following:

1. The lease transfers ownership of the real estate to the company at the end of the lease term.
2. The lease contains an option to purchase the real estate at a bargain price.
3. The non-cancelable lease term is equal to or greater than 75% of the estimated economic life of the real estate.
4. The present value of rents and other minimum lease payments equals or exceeds 90% of the fair market value of the leased property.

C. Synthetic Lease Benefits

1. Enhanced financial ratios
2. It's an “off -balance” sheet item.
3. Pricing uses lessee's credit.

4. Future appreciation and control of asset to Lessee.
5. Neither the real estate asset, nor the mortgage liability nor the lessor's equity ownership of the facility will appear on the company's balance sheet.
6. Lease Payments are classified as an operating expense by the corporate user.

* Thus return on equity, an interest coverage ratios are improved relative to on "on balance sheet" debt alternative.

7. Benefits and Burden of ownership are with the Corporate User therefore the Corporate User is regarded as tax owner and retains control of and receives depreciation.
8. Financing is readily attainable with Synthetic Leases.
9. Lease can be structured with "all in" costs which may be lower than traditional financing.

D. Synthetic Lease Risks

1. Potential change in consolidation rules
2. IRS may change ruling not allowing synthetic lease as "off-balance"

E. Next Steps

1. Review proposed transaction, summarize and compare lease, buy synthetic lease economics.
2. Review and comment on accounting including pro forma impact on tax savings.
3. Summarize tax issues including depreciation, purchase option and potential component depreciation.
4. Spreadsheet on pricing, cash flow and tax impacts of synthetic lease structure vs. alternative structure.
5. It's a financing alternative and has been used in other industries for years.

F. Conclusion

1. Tax Savings is from a Federal standpoint for a Massachusetts Investor
2. Primary targets for synthetic lease are large corporations. Retailers, manufacturers, financial institutions and health care providers, in particular, may find synthetic leases to be beneficial to the corporate balance sheet, resulting in a higher valuation for the company's stock.
3. As the number of lenders seeking real estate transactions continues to grow, more creative capital structures will evolve, and the synthetic lease structure will create opportunities for developers of corporate real estate.